

## RELIGIOUS ESTABLISHMENT IN HEARINGS TO WAIVE PARENTAL CONSENT FOR ABORTION

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### INTRODUCTION

The United States Supreme Court permits states to mandate parental consent for the abortion decisions of pregnant minors.<sup>1</sup> However, acknowledging that the constitutional right to abortion established in *Roe v. Wade*<sup>2</sup> extends to minors,<sup>3</sup> the Court has delineated the criteria that a parental consent statute must meet in order to steer clear of a transgression of that right.<sup>4</sup> Importantly, when requiring parental consent, states must give minors the opportunity to petition for a waiver of that consent.<sup>5</sup> Additionally, a minor who petitions for such a waiver must be granted her request if she demonstrates that (i) she is mature and sufficiently informed to make a decision about

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<sup>1</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding a Pennsylvania parental consent provision).

<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (overturning a Missouri parental consent regulation and holding that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”). The Court has, however, allowed states to treat pregnant teens differently from adult women given their age and potential immaturity. See *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427–28 n.10 (1983) (overturning an Ohio parental consent statute and stating that “in view of the unique status of children under the law, the States have a ‘significant’ interest in certain abortion regulations aimed at protecting children ‘that is not present in the case of an adult.’”).

<sup>4</sup> See *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) (holding that states must provide a statutory alternative to parental consent).

<sup>5</sup> *Id.* at 643 (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.” (footnote omitted)).

abortion, or (ii) even if not mature and informed, the abortion is in her best interest.<sup>6</sup> The eighteen states that presently require parental consent when minors seek abortions designate judges as the arbiters of the waiver process.<sup>7</sup>

While the Supreme Court has outlined the parameters for crafting a constitutionally sound consent statute,<sup>8</sup> and while states have parroted the language of Court opinions in order to satisfy these parameters,<sup>9</sup> in practice, the application of the judicial waiver process varies considerably, not only from state to state, but also from court to court and judge to judge. For example, for some judges the grant of a waiver petition turns on whether the minor has received counseling from the physician who will perform the abortion.<sup>10</sup> Other judges appoint a guardian to represent the fetus in waiver hearings.<sup>11</sup> Because waiver hearings are closed and records of those hearings are

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<sup>6</sup> *Id.* at 643–44.

<sup>7</sup> These states include Alabama, Arizona, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming. See ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS 1, 2 (2004) [hereinafter PARENTAL INVOLVEMENT] (displaying a chart of states which require parental consent for minors' abortions), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf) (last updated Oct. 1, 2004). In addition, Maine encourages parental consent, but allows minors to easily bypass that consent by receiving counseling. See ME. REV. STAT. ANN. tit. 22, § 1597-A (West 2000) (providing that a pregnant minor may obtain an abortion after obtaining counseling notwithstanding a lack of parental consent).

<sup>8</sup> The Court has yet to do the same for laws that require parental notification before a physician may perform an abortion on a pregnant minor. In *Ohio v. Akron Center for Reproductive Health*, the Court upheld a parental notification requirement that included a judicial waiver option, holding that "it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute." 497 U.S. 502, 511 (1990). However, the Court left unresolved whether mandated parental notice laws must incorporate a waiver option, explaining that "notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision." *Id.* (citation omitted). Despite this ambiguity, thirteen of the fourteen states that mandate parental notice of abortion include a judicial waiver option. See PARENTAL INVOLVEMENT, *supra* note 7, at 2.

<sup>9</sup> For example, under Tennessee's Parental Consent for Abortion by Minors Act, a minor may petition a juvenile court judge for an order waiving mandated consent and the "consent requirement shall be waived if the court finds either that: (1) The minor is mature and well-informed enough to make the abortion decision on the minor's own; or (2) The performance of the abortion would be in the minor's best interests." TENN. CODE ANN. § 37-10-304(e) (2001).

<sup>10</sup> See *Ex parte Anonymous*, 808 So. 2d 1030, 1033–34 (Ala. 2001) (upholding denial of petition to waive parental consent for minor's failure to consult with physician who would have performed her abortion).

<sup>11</sup> See *In re Anonymous*, 720 So. 2d 497 (Ala. 1998) (denying right of fetus through its guardian to appeal order granting minor's petition for waiver of parental consent), *aff'd* 720 So. 2d 497 (Ala. Civ. App. 1998) (dismissing the appeal of a fetus by its guardian).

sealed,<sup>12</sup> such practical variations are often obscured. Owing both to confidentiality requirements and the generality of the guidelines governing waiver proceedings, judges authorized to preside over the process enjoy substantial discretion.<sup>13</sup>

This Article exposes for examination judicial discretion in waiver proceedings that raises First Amendment Establishment Clause issues. Several juvenile court judges in Alabama condition waiver grants on the requirement that pregnant minors receive counseling from a pro-life organization.<sup>14</sup> These judges and other court personnel direct minors to obtain pregnancy counseling from a non-profit crisis pregnancy center called Sav-A-Life.<sup>15</sup> In the absence of counseling from Sav-A-Life, these judges will deny waiver petitions, justifying their denial on the ground that the minor has not received sufficient information about abortion, its consequences, and its alternatives.<sup>16</sup>

Judges undoubtedly have substantial leeway in determining what it means for a minor to be mature and informed, and what serves a young woman's best interest. Indeed, Supreme Court rulings are virtually silent as to the process by which arbiters of waiver hearings should arrive at these determinations.<sup>17</sup> But Court precedent is any-

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<sup>12</sup> Parental involvement statutes usually specify the means for protecting the identity of minors. For instance, the Pennsylvania Abortion Control Act provides that court proceedings pursuant to a judicial waiver request shall be kept confidential and that a court of common pleas which conducts proceedings . . . shall make in writing specific factual findings and legal conclusions supporting its decision and shall, upon the initial filing of the minor's petition for judicial authorization of an abortion, order a sealed record of the petition, pleadings, submissions, transcripts, exhibits, orders, evidence and any other written material to be maintained which shall include its own findings and conclusions.

18 PA. CONS. STAT. § 3206(f) (1) (2002).

<sup>13</sup> For a discussion of discretion in waiver hearings, see Suellen Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75 (1995) (examining the conduct of waiver hearings in Michigan and arguing that judicial discretion results from lack of guidance on how hearings should be conducted).

<sup>14</sup> We have heard a few anecdotal reports of judges in other states requiring Christian-based counseling. But we have no evidence that the practice of mandating pro-life counseling is widespread either in Alabama or elsewhere. While not yet a widespread practice, in Alabama's fourth largest county, two of the three juvenile court judges routinely mandate such counseling. Hence, the counseling mandate must now be considered a feature of Alabama's parental consent law. In addition, as we argue below, the constitutional injury generated by this mandate is significant and ongoing. For these reasons it is worth considering whether this counseling mandate would withstand an Establishment Clause challenge.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> The Court has offered passing comments concerning the criteria for judging whether a minor meets the standards for waiving parental consent. According to the Court, "the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." *Bellotti II*, 443 U.S. 622, 643 n.23 (1979). In addition, the Court has said, "[i]n a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests." *Id.* at 642-43. De-

thing but silent with respect to those instances when religion and government action intersect.<sup>18</sup> At first glance, this pro-life counseling requirement may appear to have little to do with the First Amendment and more to do with the Fourteenth Amendment.<sup>19</sup> Establishment Clause questions surface, however, when we consider that Sav-A-Life is a Christian ministry "under-girded by a commitment to evangelism and Biblical truth,"<sup>20</sup> which, having "accepted the challenge of sharing God's love and truth with a society that is increasingly hostile to the sanctity of human life,"<sup>21</sup> aims "to see the truth of God's Word birthed in the hearts of men and women and to make abortion unnecessary and undesirable in our region."<sup>22</sup>

This Article argues that conditioning the waiver process on a minor's receipt of pro-life counseling from Sav-A-Life violates the Establishment Clause. We argue that the Sav-A-Life counseling requirement fails each of the current legal tests used to assess alleged Establishment Clause violations. And while one might think the fact that Sav-A-Life is a religiously-based ministry should itself be enough to prove an Establishment Clause violation, because Court precedent tolerates considerable association between government and religious institutions,<sup>23</sup> it simply is not. Indeed, in 1988 the Court upheld against a facial challenge a federal grant program that dispersed funds to religiously affiliated institutions to be used for the education and counseling of adolescents on subjects pertaining to sexual relations and pregnancy.<sup>24</sup> In light of this and other accommodationist decisions, the judicial mandate at issue here needs to be differentiated from those accommodations to reveal what conduct, in the end, constitutes a breach of the First Amendment.

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spite these remarks, commentators note the dearth of guidelines for judging maturity and best interests. See, e.g., Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873 (noting that the Court has given no direction as to how a child's maturity is to be ascertained); Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, *J. SOC. ISSUES*, Fall 1992, at 203 (stating that the Supreme Court and state legislatures have given judges limited direction for determining when a waiver should be granted); Scarnecchia & Field, *supra* note 13, at 77-80 (commenting that "the Supreme Court has left trial courts to define 'maturity' and 'best interests'").

<sup>18</sup> See *infra* Part I.

<sup>19</sup> Independent of Establishment Clause considerations, one might well question on Fourteenth Amendment Due Process grounds whether the Constitution permits judges to make pro-life counseling a necessary condition for a minor's demonstration that she is sufficiently informed to proceed with an abortion absent parental consultation. But that inquiry is separate from the question that occupies us here.

<sup>20</sup> See Sav-A-Life, Inc., Home Page [hereinafter Sav-A-Life, Home Page] (on file with author) (stating Sav-A-Life's mission, which includes devotion to the absolute truth of the Creator's word).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *infra* Part I.E.

<sup>24</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1988).

Part I of this Article reviews Establishment Clause precedent and the various tests used to discern when government action amounts to a prohibited religious establishment. Part II describes the judicial practice of mandating pro-life counseling and presents evidence obtained in interviews with directors of Sav-A-Life affiliates that illuminates the religious character of their counseling. Part III shows how, despite the prevailing accommodative approach to religion found in Establishment Clause precedent, Alabama judges violate the First Amendment when they require minors to receive counseling from Sav-A-Life. Part IV considers parallel case law in the context of mandated Alcoholics Anonymous and Narcotics Anonymous substance abuse treatment programs for prisoners and parolees, showing how these rulings do not sustain a counterargument to our analysis. The Conclusion considers the magnitude of this constitutional violation and explains how an unmistakable encroachment on the Establishment Clause, one committed by judges, is allowed to persist.

## I. ESTABLISHMENT CLAUSE PRECEDENT

The Establishment Clause of the First Amendment to the U.S. Constitution, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion."<sup>25</sup>

In an early statement construing the Establishment Clause expansively, the Court in *Everson v. Board of Education* declared that the clause must mean at least

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."<sup>26</sup>

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<sup>25</sup> U.S. CONST. amend. I.

<sup>26</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947). The Court made this oft-quoted declaration in the context of a challenge to a school district plan that reimbursed parents for the costs of busing children to private schools. While this statement appears to give the Establishment Clause an interpretation that sets a high wall between church and state, in fact the *Everson*

The Court has since backed away from the absolutist language of *Everson* and now relies on a trilogy of tests for judging whether a challenged activity violates the Establishment Clause. The tests, described below, are known as the *Lemon* test, the endorsement test, and the coercion test.

### A. The *Lemon* Test

In *Lemon v. Kurtzman*,<sup>27</sup> the Court considered the constitutionality of two school funding provisions—a Rhode Island statute that provided for payment of salary supplements of up to fifteen percent to teachers of secular subjects in nonpublic elementary schools<sup>28</sup> and a Pennsylvania statute that provided for state reimbursement to nonpublic elementary and secondary schools for costs of teachers' salaries, textbooks, and instructional materials in specified secular subjects.<sup>29</sup> Recognizing that the "language of the Religion Clauses of the First Amendment is at best opaque"<sup>30</sup> and, implicitly, that the language would not, on its own, direct the proper result in the case, the Court stated that "[i]n the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"<sup>31</sup> Collapsing into a three-prong inquiry factors that the Court had, over the years, considered in deciding Establishment Clause cases, the Court advanced what is commonly known as the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>32</sup> The Court invalidated both the Rhode Island and the Pennsylvania statutes under the third prong, concluding that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."<sup>33</sup>

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Court upheld the challenged funding. See *infra* Part I.E (arguing, *inter alia*, that the metaphorical wall between church and state has been eroded by the policy of religious accommodation).

<sup>27</sup> 403 U.S. 602 (1971).

<sup>28</sup> *Id.* at 607. Only teachers in Roman Catholic schools had applied for benefits under the Rhode Island statute. *Id.* at 608.

<sup>29</sup> *Id.* at 609–10.

<sup>30</sup> *Id.* at 612.

<sup>31</sup> *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

<sup>32</sup> *Id.* at 612–13 (citations omitted).

<sup>33</sup> *Id.* at 613–14. With respect to the Rhode Island program, the Court reasoned that the substantial religious character of the church-related schools that received the statute's benefits gave rise to entangling church-state relationships. *Id.* at 615–17. According to the Court,

The Court has given the term "secular" in the first prong a broad interpretation. In general, if the government can point to a secular purpose, the action is not invalidated simply because it coincides with religious beliefs.<sup>34</sup> The Court has said that "[w]hen a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference."<sup>35</sup> However, the Court has also cautioned that it is "the duty of the courts to 'distinguish[ing] a sham secular purpose from a sincere one.'"<sup>36</sup> Still, in its analyses the Court typically finds a sufficient secular purpose and goes on to consider the other two *Lemon* prongs.<sup>37</sup>

Under the second prong, the Court questions whether the governmental action has the "effect" of advancing or inhibiting religion.<sup>38</sup> Establishment Clause precedent strictly prohibits certain types of effects. For example, the Court forbids government policies that discriminate between religious denominations.<sup>39</sup> Precedent also for-

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teachers dedicated to their religion and working in a school designed to inculcate the tenets of that religion, would invariably have difficulty segregating religious beliefs from secular educational responsibilities. *Id.* at 618–19. Moreover, the intensive monitoring required by the state to implement the program's mandates itself was "fraught with the sort of entanglement that the Constitution forbids." *Id.* at 620. Similarly, with respect to the Pennsylvania program, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state." *Id.* at 620–21. In addition, where the Pennsylvania statute provided state financial aid directly to the church-related school, close control and surveillance, which would create the violative entanglement, were virtually guaranteed. *Id.* at 621–22.

<sup>34</sup> See Rachel F. Calabro, Comment, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 575 (1998) (discussing the breadth of interpretations of "secular").

<sup>35</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (overturning a school district policy that permitted, but did not require, a student-initiated nonsectarian prayer at all home football games).

<sup>36</sup> *Id.* (alteration in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring)). Declining deference in this case and rejecting the purported secular purposes put forward by the school district—to "fost[e]r free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establish[h] an appropriate environment for competition," *id.* at 309 (alteration in original)—the Court found it "reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice,'" *id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

<sup>37</sup> See Calabro, *supra* note 34, at 575–76 (using the example of Sunday closing laws to illustrate how the Court finds sufficient secular purposes in practices that developed out of religious beliefs).

<sup>38</sup> *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

<sup>39</sup> See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (concluding that the principle "that government should not prefer one religion to another" is "at the heart of the Establishment Clause"); see also *Wallace*, 472 U.S. at 52–54 (noting that the First Amendment proscribes not only the preference of one Christian sect over another, but also the preference of any religion over another and even over no religion at all); *Sch. Dist. v. Schempp*, 374 U.S. 203, 216–17 (1963) (citing Court precedent supporting the finding that the proscriptions of the Establishment Clause are not limited to government preference of one religion over another).

bids government indoctrination into the beliefs of a religion.<sup>40</sup> Other effects are not as easily defined or identifiable, and courts have struggled to unpack the meaning of this second prong.<sup>41</sup>

The third *Lemon* prong often proves to be the deciding factor in Establishment Clause cases.<sup>42</sup> In assessing Establishment Clause claims under the excessive entanglement prong, the Court has examined “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.”<sup>43</sup> But the formation of tangible connections between government and religion—even where those connections include financial support or administrative oversight—does not necessarily breach *Lemon*’s third prong.<sup>44</sup> The Court, especially in recent years, has not rejected as excessively entangling relationships generated when government seeks to accommodate religion.<sup>45</sup> The Court has said, “Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”<sup>46</sup> Entanglement becomes excessive, the Court has found, when governmental aid or action necessitates pervasive monitoring of a religious organization by public authorities.<sup>47</sup> However, entanglement is not necessarily excessive when aid flows to a religious organization as part of a general welfare program, even when that aid produces the need for government oversight; whether the resulting entanglement rises to

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<sup>40</sup> See, e.g., *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985) (“Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”); see also *infra* Part III.A.2 (assessing the jurisprudence under the effects prong of the *Lemon* test and discussing the contours of what constitutes impermissible indoctrination of religion).

<sup>41</sup> See Calabro, *supra* note 34, at 576 (discussing the challenges posed by *Lemon*’s second prong).

<sup>42</sup> See *id.* at 577 (concerning judicial struggles in applying the third prong).

<sup>43</sup> *Agostini*, 521 U.S. at 232 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)).

<sup>44</sup> *Id.*; see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764–65 (1976) (rejecting an excessive entanglement claim where state grants to religious colleges are audited annually by the state).

<sup>45</sup> See, e.g., *Agostini*, 521 U.S. at 209 (upholding a New York City program that permitted public school teachers to provide remedial education to students in private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993) (finding that the use of a state-employed sign-language interpreter in a Roman Catholic high school does not amount to excessive entanglement); *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (holding that governmental grant monitoring of religious organizations that receive funding for adolescent education does not create excessive entanglement, at least where the grant recipients are not “pervasively sectarian”).

<sup>46</sup> *Agostini*, 521 U.S. at 233 (citation omitted).

<sup>47</sup> *Id.*



the level of excessive often depends on whether the religious institution is deemed pervasively sectarian.<sup>48</sup>

The *Lemon* test has been derided since its inception. It has been criticized for, among other things, its vagueness and lack of analytical precision by both legal commentators<sup>49</sup> and the Justices themselves.<sup>50</sup> Thus, efforts to revise, clarify, and even discard the test have been a feature of Establishment Clause rulings. Among the more notable efforts to revise *Lemon* has been an attempt to collapse the second and third prongs. The Court has, in recent cases applying *Lemon*, treated the excessive entanglement prong as "an aspect of the inquiry into a statute's [or another governmental action's] effect."<sup>51</sup> Indeed, the Court has recognized that the factors used "to assess whether an entanglement is 'excessive' are similar to the factors . . . use[d] to examine 'effect.'"<sup>52</sup> Despite this recognition, the Court has not definitively reduced *Lemon* to a two-pronged test.

### B. The Endorsement Test

*Lemon* remained the sole standard against which the Court measured alleged Establishment Clause violations<sup>53</sup> until, after growing criticism of *Lemon*, a majority of the Court in 1989 adopted an alternate test that Justice O'Connor had previously formulated and urged: the endorsement test. Suggesting an alternate endorsement-based formulation as a "clarification" of Establishment Clause doctrine, Justice O'Connor, concurring in *Lynch v. Donnelly*, wrote:

The Establishment Clause prohibits government from making adherence to religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two prin-

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<sup>48</sup> *Id.* at 234–35. Generally speaking, a pervasively sectarian institution is one in which, *inter alia*, "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743 (1973); see *infra* Part III.A.2.

<sup>49</sup> See, e.g., Calabro, *supra* note 34, at 577 ("At best, its use is 'unclear and unpredictable' and application of the *Lemon* test has often resulted in contradictory decisions.") (footnote omitted); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993) ("[T]he ambiguity of the test left the Court leeway to interpret each prong in varying ways, producing a bewildering patchwork of decisions . . .").

<sup>50</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (commenting that the application of the *Lemon* test has made a "maze of the Establishment Clause"); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (stating that the "*Lemon* test has caused this Court to fracture into unworkable plurality opinions"); see also Calabro, *supra* note 34, at 577–78 nn.89 & 97 (cataloguing *Lemon* criticism in Supreme Court opinions).

<sup>51</sup> *Agostini*, 521 U.S. at 233.

<sup>52</sup> *Id.* at 232–33.

<sup>53</sup> Despite expressing "unwillingness to be confined to any single test or criterion" in Establishment Clause cases, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), the Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Larson v. Valente*, 456 U.S. 228 (1982), and *Marsh v. Chambers*, 463 U.S. 783 (1983). See *Lynch*, 465 U.S. at 679 (discussing history of *Lemon* test use).

cial ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>54</sup>

As articulated by Justice O'Connor, the endorsement test effectively collapses the first two prongs of the *Lemon* test<sup>55</sup> and recasts them in terms of perception:<sup>56</sup>

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>57</sup>

Thus recast, the endorsement test considers whether a "reasonable observer" would view the challenged practice as conveying a message of religious endorsement.<sup>58</sup>

In *County of Allegheny v. American Civil Liberties Union*,<sup>59</sup> the Court formally adopted this test in its assessment of two separate religious holiday displays in Pittsburgh, Pennsylvania.<sup>60</sup> A majority in *Allegheny*

<sup>54</sup> *Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring).

<sup>55</sup> See *Newdow v. U.S. Congress*, 292 F.3d 597, 606 (9th Cir. 2002) (holding that the phrase "Under God" in the pledge of allegiance violates the Establishment Clause in part because it conveys a message of state endorsement of religious beliefs), *rev'd on other grounds sub nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004). One commentator observes that although the endorsement test can be viewed as being similar to the second *Lemon* prong, the endorsement test prohibits a broader range of conduct. See Byron K. Henry, Comment, *In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 451 (1997) (noting that while the *Lemon* test, in requiring that the "primary or principal effect" of the state action be one that neither advances nor inhibits religion, upheld state action with incidental or secondary effects that happened to advance or inhibit religion, *Lynch* and *Allegheny*, applying the endorsement test, were more willing to find such state actions unconstitutional).

<sup>56</sup> See Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 799 (1998) (noting Justice O'Connor's persistent criticism of *Lemon* and describing her alternative approach).

<sup>57</sup> *Lynch*, 465 U.S. at 690.

<sup>58</sup> Apanovitch, *supra* note 56, at 799–800 (relying on *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 778–79 (1995)). For further analysis of the Court's view of the role of the reasonable observer, see James E. McBride, Note, *Alcoholics Anonymous: Anonymous Theists? Griffin v. Coughlin and the "Wall of Separation Between Church and State" in the New York State Prison System*, 19 CARDOZO L. REV. 1455, 1478 (1998).

<sup>59</sup> 492 U.S. 573 (1989).

<sup>60</sup> At issue in *Allegheny* was whether a Christian nativity scene placed on the Allegheny County Courthouse staircase and a Chanukah menorah placed outside of an office building jointly owned by the city of Pittsburgh and Allegheny County violated the Establishment Clause. *Id.* at 578. The crèche, which stood alone on the staircase, displayed a banner proclaiming "Gloria in Excelsis Deo!" ("Glory to God in the Highest!") and a sign indicating that it was dedi-

agreed that the endorsement test helps to clarify the *Lemon* test by focusing Establishment Clause consideration on "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."<sup>61</sup> Quoting O'Connor's concurrence in *Lynch*, the Court declared,

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>62</sup>

The Court further explained, in applying the endorsement test to the challenged holiday displays, that the constitutionality of such governmental conduct<sup>63</sup> turns on whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."<sup>64</sup>

Since *Allegheny*, courts have applied the endorsement test primarily to cases involving the constitutionality of public religious displays.<sup>65</sup>

cated by a Roman Catholic group. *Id.* at 580. The menorah stood next to the city's forty-five-foot decorated Christmas tree, at the base of which was a sign bearing the mayor's name and declaring the city's "salute to liberty" during the holiday season. *Id.* at 582. A Jewish group owned the menorah, but each year the city stored, erected, and removed the display. *Id.* at 579-82.

<sup>61</sup> *Id.* at 592.

<sup>62</sup> *Id.* at 593-94 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 687).

<sup>63</sup> The Court explained that the fact that the crèche bore a sign disclosing its ownership by a Roman Catholic organization did not alter the constitutional analysis: "[T]he Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Id.* at 600.

<sup>64</sup> *Id.* at 597 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985)). Applying this analysis, the Court ruled the crèche display unconstitutional but upheld the constitutionality of the menorah display. The court framed the issue as "whether the display of the creche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs." *Id.* Reasoning that "nothing in the context of the [crèche] display detracts from the creche's religious message," the Court found that *Allegheny* had chosen, by placing the crèche on its own in the "main" and "most beautiful part" of the building that is the seat of county government . . . to celebrate Christmas in a way that ha[d] the [prohibited] effect of endorsing a patently Christian message." *Id.* at 598-99, 601. By contrast, the context of the menorah display communicated a secular message:

[T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with *Lynch*.

*Id.* at 616.

<sup>65</sup> See, e.g., *Joki v. Bd. of Educ.*, 745 F. Supp. 823 (N.D.N.Y. 1990) (holding that a student painting of a man nailed to a wooden cross displayed in a public high school auditorium vio-

However, the test turns up as well in some reviews of cases involving prayer or religious education in public schools and state religious holidays.<sup>66</sup>

### C. The Coercion Test

In *Lee v. Weisman*,<sup>67</sup> the Court adopted the coercion test as an independent means for assessing Establishment Clause challenges. In holding that an invocation and benediction by a clergy member at a public secondary school graduation ceremony violated the Establishment Clause, the Court relied on the principle that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>68</sup> That the Constitution "at a minimum" prohibits such coercion is, Justice Kennedy explained in his ruling, beyond dispute.<sup>69</sup>

The context of the religious expression proved important to the Court's analysis in *Lee*. Distinguishing the case from an earlier decision upholding the practice of opening a state legislative session with a prayer,<sup>70</sup> Justice Kennedy noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."<sup>71</sup> The

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lated the Establishment Clause by conveying a message of government endorsement of Christianity).

<sup>66</sup> See Apanovitch, *supra* note 56, at 800 n.80 (listing various other contexts in which the endorsement test was applied). In *Allegheny*, Justice Blackmun cites instances beyond religious displays in which the Court used the concept of endorsement, noting, for example, that in *Wallace*, "the Court held unconstitutional Alabama's moment-of-silence statute because it was 'enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities.'" 492 U.S. at 592 (citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)).

<sup>67</sup> 505 U.S. 577 (1992).

<sup>68</sup> *Id.* at 587 (alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Under this principle, coercion is sufficient but not necessary to show a breach of the Establishment Clause. *Id.* at 604 (Blackmun, J., concurring); see also *Newdow v. U.S. Congress*, 292 F.3d 597, 607 n.5 (9th Cir. 2002) (cataloguing cases indicating that coercion is not a necessary element in finding an Establishment Clause violation).

<sup>69</sup> *Lee*, 505 U.S. at 587. Commentators dispute, however, "the terms and type of coercion sufficient to constitute an Establishment Clause violation." Calabro, *supra* note 34, at 580. As one commentator explains, Justice Kennedy's majority opinion focused on the psychological coercion resulting from the peer or social pressure to participate in the exercise. *Id.* By contrast, Justice Scalia's dissent criticized the psychological coercion test and instead applied a legal coercion test, defining prohibited conduct as "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Id.* (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)). Justice Blackmun's concurrence advanced another formulation of the coercion test, suggesting that if government pressures someone to participate in a religious activity, that activity is "an obvious indication that the government is endorsing or promoting religion." *Id.* at 581 (quoting *Lee*, 505 U.S. at 604 (Blackmun, J., concurring)).

<sup>70</sup> See *Lee*, 505 U.S. at 596-97 (distinguishing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

<sup>71</sup> *Id.* at 592.

Court reasoned that the school district's supervision and control of the graduation ceremony placed public and peer pressure on attending students to participate in, or at least show respect by maintaining silence during, the invocation and benediction.<sup>72</sup> In the Court's view, "In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit."<sup>73</sup> According to the Court, "This pressure, though subtle and indirect, can be as real as any overt compulsion."<sup>74</sup> The Court concluded that the state could not, consistent with Establishment Clause principles, uphold the invocation and benediction practice; doing so would place primary and secondary school children-objectors in the impermissible position of choosing between participating in such a religious exercise or protesting.<sup>75</sup>

#### *D. Interaction of the Three Establishment Clause Tests*

Despite its adoption of the endorsement and coercion tests, the Court has not overruled or entirely abandoned the *Lemon* test. Instead, the Court maintains three alternative tests and, as recent case law instructs, a failure to meet any one of the tests is sufficient to show an Establishment Clause violation.<sup>76</sup> However, the Court has not provided clear guidance about the conditions under which each of these tests ought to apply and itself chooses, often based on no stated or obvious principle, to apply one test over others or, in some cases, to apply all three.<sup>77</sup>

#### *E. Religious Accommodation*

While *Everson v. Board of Education*'s early rendering of the Establishment Clause relied on Thomas Jefferson's famous wall of separation metaphor—holding that the "wall must be kept high and im-

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<sup>72</sup> *Id.* at 593.

<sup>73</sup> *Id.* at 597.

<sup>74</sup> *Id.* at 593.

<sup>75</sup> *Id.* at 593.

<sup>76</sup> See, e.g., *id.* at 598–99 (holding that failure to meet the coercion test is sufficient to show an Establishment Clause violation); see also Henry, *supra* note 55, at 453 ("[A]ccording to *Lee*, in addition to the practices forbidden by *Lemon* as modified by *Allegheny*, the Establishment Clause also prohibits direct or indirect coercion of individuals to participate in religion, as well as any tie between the state and religion that tends to convey the message of approval of religion.").

<sup>77</sup> In *Newdow*, the Court of Appeals for the Ninth Circuit explained:

We are free to apply any or all of the three tests . . . . The Supreme Court has not repudiated *Lemon*; in *Santa Fe*, it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee*, the Court invalidated the policy solely on the basis of the coercion test.

*Newdow v. U.S. Congress*, 292 F.3d 597, 607 (9th Cir. 2002).

pregnable"<sup>78</sup>—the decision in the case belied that rendering. In that case, the Court upheld a local ordinance that permitted parents to deduct from their state tax returns the cost of busing their children to private schools, including parochial schools.<sup>79</sup> As James E. McBride comments, the decision offered up "one of the most remarkable twists in the history of [the] Supreme Court."<sup>80</sup> And since *Everson*, the Court has adopted an increasingly accommodative stance toward government interaction with religion.<sup>81</sup> Indeed, as McBride aptly explains:

While the invocation of Jefferson's metaphor appears to provide a definitive boundary between religion and government, the history of Establishment Clause jurisprudence has born witness to its deconstruction. The wall has been eroding from the very moment of its inception; it is as if the wall cannot exist without its breach.<sup>82</sup>

Substantial erosion of the wall of separation and the adoption of what is seen as accommodationist logic are particularly notable in cases involving government funding that flows to religious institutions.<sup>83</sup> The Court has advanced the view that when government provides aid in a neutral fashion—that is, without regard to religion—the flow of that aid to religious institutions does not necessarily run afoul of the First Amendment.<sup>84</sup> Following the logic that "religious institutions need not be quarantined from public benefits that are neutrally available to all,"<sup>85</sup> the Court has authorized, for example, laws that have (1) loaned secular textbooks to children in parochial schools;<sup>86</sup> (2) permitted parents to deduct from state tax returns tuition, textbooks, and transportation costs associated with sending children to

<sup>78</sup> 330 U.S. 1, 18 (1947).

<sup>79</sup> *Id.* at 17.

<sup>80</sup> McBride, *supra* note 58, at 1470.

<sup>81</sup> See, e.g., John W. Huleatt, Comment, *Accommodation or Endorsement?* Stark v. Independent School District: *Caught in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN'S L. REV. 657, 657 (1998) ("Recent cases indicate the Court is moving from a strict separation of church and state to a more accommodationist approach").

<sup>82</sup> McBride, *supra* note 58, at 1470.

<sup>83</sup> See, e.g., Jennifer D. Dougherty, Note, *Agostini v. Felton: Sanctioning a Trend in the Accommodation of Educational Services for Underprivileged and Disabled Children*, 29 SETON HALL L. REV. 1008, 1035–36 (1999) (arguing that in its ruling in *Agostini*, "the Court has announced a standard that will more readily accommodate statutes that can avoid entanglement between church and state").

<sup>84</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (holding that a federally funded program providing remedial instruction to disadvantaged children in parochial schools is not a violation of the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (holding that a government funded program providing money for a sign language interpreter to accompany a deaf child to classes at a Roman Catholic high school is not a violation of the Establishment Clause).

<sup>85</sup> *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976).

<sup>86</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968).

sectarian schools;<sup>87</sup> (3) provided annual subsidies directly to religiously affiliated colleges and universities;<sup>88</sup> and (4) granted funding for a deaf student to bring to his Roman Catholic high school a state-employed sign-language interpreter.<sup>89</sup> In each of these instances, the sustained program distributed aid without reference to religious affiliation. In such circumstances, funding programs do not, the Court has ruled, impermissibly advance religion through the creation of "a financial incentive to undertake religious indoctrination."<sup>90</sup> As the Court has explained, "[t]his incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."<sup>91</sup>

Advancing this logic in a particularly notable accommodationist move, the Court in *Agostini v. Felton* upheld a New York City program that authorized public school teachers to offer remedial education to eligible students in private schools.<sup>92</sup> In so doing, the Court reversed its 1985 decision in *Aguilar v. Felton*,<sup>93</sup> handed down twelve years earlier, which found the same program constitutionally deficient. Abandoning *Aguilar*, the *Agostini* Court emphasized again the neutral and nonpreferential character of the challenged aid program. But moving even further, the Court explained that Establishment Clause law had changed since its 1985 holding.<sup>94</sup> Importantly, the Court announced its departure from the previously relied upon rule "that all government aid that directly assists the educational function of religious schools is invalid."<sup>95</sup> The Court also noted its departure from earlier holdings that presumed "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."<sup>96</sup> With these modifications of the rationale driving earlier cases, the Court overturned *Aguilar*,<sup>97</sup> a case that Justice Scalia once described as "hostile to our national tradition of accommodation."<sup>98</sup>

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<sup>87</sup> *Mueller v. Allen*, 463 U.S. 388, 391 (1983).

<sup>88</sup> *Roemer*, 426 U.S. at 736.

<sup>89</sup> *Zobrest*, 509 U.S. at 3.

<sup>90</sup> *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 209.

<sup>93</sup> 473 U.S. 402 (1985).

<sup>94</sup> *Agostini*, 521 U.S. at 237.

<sup>95</sup> *Id.* at 225.

<sup>96</sup> *Id.* at 223.

<sup>97</sup> *Id.* at 235. *Agostini* also overturned portions of *School District v. Ball*, 473 U.S. 373 (1985). 521 U.S. at 235.

<sup>98</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 750 (1994) (Scalia, J., dissenting).

Consistent with this accommodationist approach, and especially relevant to the instant analysis, is the Court's decision in *Bowen v. Kendrick*.<sup>99</sup> There, the Court took up a facial challenge to the Adolescent Family Life Act ("AFLA"), a federal grant program that funded services related to adolescent sexual relations and pregnancy. Under AFLA, organizations that provided care for pregnant adolescents or offered services to prevent adolescent sexual relations could apply for and receive federal funding.<sup>100</sup> Furthermore, AFLA encouraged an integrated approach to the provision of services that included, among other things, religious organizations.<sup>101</sup> In so doing, AFLA thereby permitted funding of religiously affiliated organizations. Rejecting the facial challenge brought against AFLA,<sup>102</sup> the Court argued that religious institutions are not "disabled by the First Amendment from participating in publicly sponsored social welfare programs,"<sup>103</sup> even when the social welfare program entails education and counseling provided by religious organizations to adolescents. A statute is not invalid, the Court held, merely because "it authorizes 'teaching' by religious grant recipients on 'matters [that] are fundamental elements of religious doctrine,' such as the harm of premarital sex and the reasons for choosing adoption over abortion."<sup>104</sup> The Court justified this holding with the following rationale:

On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion. Nor does the alignment of the statute and the religious views of the grantees run afoul of our proscription against "fund[ing] a specifically religious activity in an otherwise substantially secular setting." The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not

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<sup>99</sup> 487 U.S. 589, 593–94 (1988).

<sup>100</sup> *Id.*

<sup>101</sup> Grant applicants must specify how they will, "as appropriate in the provision of services[,] involve families of adolescents[, and] involve religious and charitable organizations." *Id.* at 596 (quoting 42 U.S.C. § 300z-5(a)(21) (1982)).

<sup>102</sup> The Court did not conclude on the merits of the "as applied" challenge and instead remanded the case for reconsideration by the district court. The Court admitted that there was some evidence in the record showing "specific incidents of impermissible behavior by AFLA grantees." *Id.* at 620. Nevertheless, the Court remanded for a determination as to whether in particular cases AFLA aid funded "pervasively sectarian" institutions or funded religious activities in a setting that was otherwise substantially secular. *Id.* at 620–21.

<sup>103</sup> *Id.* at 609.

<sup>104</sup> *Id.* at 612 (quoting *Kendrick v. Bowen*, 657 F. Supp. 1547, 1562 (D.D.C. 1987)).



themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.<sup>105</sup>

In so holding, *Bowen* explicitly rejected the proposition that the First Amendment prohibits a legislative judgment that religious organizations can help solve certain secular problems:<sup>106</sup>

Particularly when, as Congress found, "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties," it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote."<sup>107</sup>

The accommodationist approach advanced in *Bowen*, like that put forward in *Agostini* and a host of other decisions, might be seen as inviting, or at least permitting, just the kind of reliance on religious organizations manifest by trial court judges who send minors to Sav-A-Life. Clearly, if we are to conclude that this counseling mandate runs afoul of the First Amendment, we must distinguish it from practices permitted by operative precedent.

## II. MANDATED SAV-A-LIFE COUNSELING IN ALABAMA

### A. *The Alabama Parental Consent Statute*

In 1987, the Alabama legislature enacted a one-parent consent requirement for unemancipated minors under eighteen years of age.<sup>108</sup> The statute includes a waiver provision that facially satisfies standing Establishment Clause precedent<sup>109</sup> and precedent governing parental consent mandates.<sup>110</sup> According to this provision, a pregnant minor who elects not to or cannot obtain parental consent for an abortion may petition the juvenile court or a court of equal standing for a

<sup>105</sup> *Id.* at 612–13 (citations omitted).

<sup>106</sup> The Court noted that nothing in prior precedent prevents Congress "from recognizing the important part that religion or religious organizations may play in resolving certain secular problems." *Id.* at 607.

<sup>107</sup> *Id.* (citation omitted).

<sup>108</sup> See 1987 Ala. Acts 87-286 § 3.

<sup>109</sup> Nothing on the face of the Alabama parental consent statute makes reference to religion. See ALA. CODE § 26-21-1 to -8 (2003).

<sup>110</sup> See, e.g., *Ex parte Anonymous*, 531 So. 2d 901, 904 (Ala. 1988) ("The standards under which the juvenile or other trial court is to decide whether to waive the [parental] consent requirement are specifically set out in *Bellotti II* and are exactly those found in our parental consent act . . .").

waiver of that consent.<sup>111</sup> The Act incorporates procedural guarantees governing the waiver process. A court designated to handle waiver petitions must proceed expeditiously<sup>112</sup> and confidentially,<sup>113</sup> and must advise the minor of her right to court-appointed counsel.<sup>114</sup> Those minors who fail to secure a waiver of parental consent must be offered the opportunity to pursue an "expedited confidential and anonymous appeal."<sup>115</sup>

With respect to the substance of the minor's petition, the Act stipulates that parental consent "shall be waived if the court finds either: (1) That the minor is mature and well-informed enough to make the abortion decision on her own; or (2) That performance of the abortion would be in the best interest of the minor."<sup>116</sup> A court that renders a decision on a waiver petition must "issue written and specific factual findings and legal conclusions supporting its decision."<sup>117</sup> Beyond these parameters, the Act offers no substantive guidance for how judges should make their factual findings or arrive at their legal conclusions. Though Alabama appellate court rulings provide some guidance,<sup>118</sup> by and large juvenile court judges retain the freedom to devise their own standards.<sup>119</sup>

<sup>111</sup> ALA. CODE § 26-21-3(e). The minor may petition the court in the county in which she resides or the county in which the abortion is to be performed. *Id.*

<sup>112</sup> *Id.* § 26-21-4(e) ("Court proceedings shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case, except as provided herein, shall the court fail to rule within 72 hours of the time the petition is filed, Saturdays, Sundays, and legal holidays excluded.").

<sup>113</sup> *Id.* § 26-21-4(i).

<sup>114</sup> *Id.* § 26-21-4(b).

<sup>115</sup> *Id.* § 26-21-4(h) ("If notice of appeal is given, the record of appeal shall be completed and the appeal shall be perfected within five days from the filing of the notice of appeal.").

<sup>116</sup> *Id.* § 26-21-4(f).

<sup>117</sup> *Id.* § 26-21-4(g).

<sup>118</sup> Since the Alabama parental consent provision took effect, more than forty-five appellate decisions have been handed down in cases involving challenges by minors to trial court decisions denying waiver requests.

The Alabama Court of Civil Appeals has handed down most of these decisions. *See, e.g., In re Anonymous*, 812 So. 2d 1218 (Ala. Civ. App. 2001); *In re Anonymous*, 771 So. 2d 1043 (Ala. Civ. App. 2000); *In re Anonymous*, 733 So. 2d 429 (Ala. Civ. App. 1999); *In re Anonymous*, 684 So. 2d 1337 (Ala. Civ. App. 1996); *In re Anonymous*, 597 So. 2d 225 (Ala. Civ. App. 1992); *In re Anonymous*, 515 So. 2d 1254 (Ala. Civ. App. 1987). Hearing appeals of some of these decisions, the Supreme Court of Alabama has handed down another eleven rulings in waiver cases. *See, e.g., Ex parte Anonymous*, 808 So. 2d 1030 (Ala. 2001); *Ex parte Anonymous*, 595 So. 2d 499 (Ala. 1992); *Ex parte Anonymous*, 531 So. 2d 901, 905 (Ala. 1988). For an analysis of some of these appeals, see Steven F. Stuhlberg, Case Note, *When is a Pregnant Minor Mature? When is an Abortion in her Best Interests? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law: In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1991), 60 U. CIN. L. REV. 907, 933 (1992) ("Two state appellate court decisions applying Alabama's abortion parental consent statute have fleshed out to some degree the key concept of 'maturity.'"); Helena Silverstein, *The View from the Bench: Judging Parental Consent Bypass Requests in Alabama* (Mar. 2001) (unpublished manuscript, on file with author) (explaining how Alabama appellate courts have elaborated standards for

### B. Judicial Implementation of the Waiver Option

With respect to determining whether a minor is sufficiently informed to make the abortion decision without parental guidance, the available evidence<sup>120</sup> suggests that Alabama juvenile court judges seek to discover her familiarity with the medical aspects of the abortion procedure, including its side effects and potential complications.<sup>121</sup>

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determining a minor's maturity and best interests and how trial courts often construct their own standards during waiver hearings).

<sup>119</sup> See, e.g., Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 69-70 (2001-2002) ("The meaning of 'mature and informed' is a contested matter played out time and again in waiver of parental consent hearings, and what counts as the 'best interest' of a pregnant minor is fashioned by trial court judges and state appellate courts that hear appeals of denied waivers. Even with the oversight of the appeals process, how trial judges conduct waiver hearings is, within certain broadly defined boundaries, a matter of substantial discretion.") (footnote omitted).

<sup>120</sup> Since waiver hearings are closed and the transcripts of those hearings are sealed, public information on the waiver process is hard to come by. Therefore, interviews with those involved in waiver proceedings offer a window into a largely concealed arena. Because this Article is part of a larger project on judicial waiver proceedings in Alabama, the data presented here is derived from interviews and phone contacts conducted at different stages of research. The first stage of interviews, conducted between March and July 2001, aimed to elicit general information about the waiver process, including, for example, the types of questions judges and lawyers ask minors at hearings, the role played by judges, attorneys, and witnesses, the frequency of grants and denials, etc. The stage-one interviews were semi-structured phone interviews, averaging about forty-five minutes in length. Twenty-eight people in Alabama participated in those interviews, including judges, court intake officers, attorneys representing minors, attorneys appointed to represent the fetus, and abortion providers.

During the second stage of the project, phone contacts were made between September and October 2001 with each of the courts responsible for handling waiver petitions in Alabama's sixty-seven counties. Each of these contacts began with the juvenile courts of each county. In seeking to determine whether the courts are prepared to handle waiver inquiries, we approached the courts in accordance with how a pregnant teen might initiate such an inquiry. In what follows, we draw to some extent on the findings derived from these contacts, but our analysis does not rely heavily on this material. For more information on the methods of the second stage, see Helena Silverstein & Leanne Speitel, *"Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75, 85-88 (2002).

From data gathered during the first two stages of research, we learned about the practice of sending minors to obtain pro-life counseling from Sav-A-Life. To further examine this practice, in July 2003, Helena Silverstein visited ten crisis pregnancy centers in Alabama to conduct interviews with the directors of these organizations. The interviews were semi-structured and open-ended. Most lasted about an hour. We sought out interviews with the directors of crisis pregnancy centers located in and around the counties where judges require pro-life counseling. Six interviews were conducted with Sav-A-Life affiliates; three interviews were conducted with the directors of non-Sav-A-Life centers.

In the discussion that follows, we do not identify the names of those interviewed. We reference the information obtained during stages one and three of our research as "Interview" and the information obtained during stage two as "Phone Contact."

<sup>121</sup> For example, one attorney explained in typical fashion that "[t]he court wants to hear how the procedure is performed, what the risks are including sterility, death, bleeding, infertility, suicide attempts, depression, post-traumatic stress. They want [the minor] to understand everything about this procedure." Telephone Interview with Attorney representing minors in

Judges are interested in learning whether the minor has plans for securing a safe abortion and for handling complications that might arise following the procedure.<sup>122</sup> Judges generally also want to know whether the minor is aware of alternatives to abortion and whether she knows about assistance available for women who wish to carry their pregnancies to term.<sup>123</sup> In addition, some juvenile court judges explore a minor's views on the psychological and emotional aspects of abortion.<sup>124</sup>

While a minor might testify knowledgeably about all of these subjects, some judges place weight on the source of a minor's information. Some judges require that minors receive counseling on the medical aspects of abortion from the performing physician, maintaining that acquiring medical information from other sources will not suffice. For example, a judge in Jefferson County denied a waiver petition in part because the minor had not consulted with the physician who would perform the abortion.<sup>125</sup> Although the minor testified that she had talked to her pediatrician about the procedure, the judge ruled this guidance inadequate.<sup>126</sup>

Other judges argue that to be well-informed a minor must receive counseling not only from those who work at abortion clinics, but also from those who oppose abortion. Interviews with those involved in the waiver process reveal that at least four judges in three Alabama counties condition waiver grants on the receipt of pro-life counseling from a crisis pregnancy center called Sav-A-Life.<sup>127</sup> In these counties,

Ala. (June 1, 2001). In addition to interviews, appellate court rulings in Alabama illustrate the types of questions posed to minors at waiver hearings. See appellate court cases cited *supra* note 118.

<sup>122</sup> The minor's attorney will ask, for example, "Have you made your plans about what you'll do if there are complications? Where are you going to stay afterwards? What are you going to do if suddenly you have to go the hospital?" Telephone Interview with Ala. Juvenile Court Judge (June 1, 2001).

<sup>123</sup> According to an attorney who acts as guardian for fetuses in waiver hearings, "I ask them about alternatives: raising it themselves, adoption, Catholic social services, there are a number of agencies that will take the child. . . . I try to get them to think if there are alternatives." Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus (May 23, 2001).

<sup>124</sup> Consider, for instance, the following explanation offered by an Alabama juvenile court judge who denied a minor's waiver petition:

[T]his Court had concerns about the petitioner's lack of any knowledge about the possible long-term psychological effects of abortion. This petitioner was not informed about the possibility of negative long-term effects. Petitioner referred to the procedure as "killing the child." She did not seem to be aware or concerned that there could be any negative consequences.

*Ex parte Anonymous*, 808 So. 2d 1030, 1033 (Ala. 2001).

<sup>125</sup> *Id.*

<sup>126</sup> According to the judge, "As the pediatrician was not the physician performing the procedure and was in a different field of medicine, this Court did not believe this was sufficient to inform petitioner regarding her particular procedure." *Id.*

<sup>127</sup> Interview with Director of Sav-A-Life Affiliate 1, in Ala. (July 24, 2003); Phone Contact with Ala. County Juvenile Court (Oct. 10, 2001); Telephone Interview with Ala. Juvenile Court

Sav-A-Life counseling has become a routine component of the judicial waiver process. As a judge in one of these counties explained, to determine whether a minor satisfies the criteria for obtaining a waiver of consent,

[t]here are several factors involved, there are agencies that need to be involved to counsel with and talk with this person. They used to be called Sav-A-Life, maybe it's the same now. She has to talk to them about what her options are. There is a hearing that has to be conducted; the burden is on her to prove that she has considered medical, emotional, psychological issues . . . .<sup>128</sup>

A second judge explained that he, along with one of his fellow judges, "will want [the minors] to have been to Sav-A-Life, to see what there is to help them make the right decision."<sup>129</sup> Asked whether proof of a minor being well-informed depends on such a visit, this judge replied, "I would say yes, but normally rather than simply deny, when that's happened in the past I've said go to Sav-A-Life, and the girl did go to Sav-A-Life, and I granted the waiver. But they know we're going to ask that so they've been to Sav-A-Life before the hearing."<sup>130</sup>

In addition to the accounts of these judges, actions taken in various cases indicate that judges require Sav-A-Life counseling. For instance, one judge refused to grant a waiver request in part on the grounds that the minor had not secured counseling from a pro-life organization.<sup>131</sup> In other instances where minors did not pursue pro-

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Judge, *supra* note 122; Telephone Interview with Attorney representing minors in Ala., *supra* note 121. In a fourth county, a court intake officer explained,

part of the ruling that the judge makes, there's a couple of things he has to take into consideration. Is she mature enough to make an informed decision? The attorneys want to make sure that she can say she's informed. So they may send her to Sav-A-Life and talk with the folks at Sav-A-Life. Not that they want her to not choose an abortion. But so she could say to the judge, yes I talked to this person and this is what they explained to me. And I understand my options. And then we'd have a hearing.

Phone Contact with Ala. County Juvenile Court (Sept. 24, 2001).

<sup>128</sup> Phone Contact with Ala. County Juvenile Court, *supra* note 127. This judge went on to provide the name and phone number of the local Sav-A-Life affiliate. *Id.* The remarks of the director of the Sav-A-Life affiliate located in this county confirm that judges sometimes send minors for counseling: "We had a girl that came in for counseling and the judge required her to come to us before he would grant her a waiver." Interview with Director of Sav-A-Life Affiliate 2, in Ala. (July 22, 2003).

<sup>129</sup> Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122.

<sup>130</sup> *Id.*

<sup>131</sup> See *In re Anonymous*, 733 So. 2d 429 (Ala. Civ. App. 1999) (overturning a ruling by the trial court that denied a minor's waiver request on the grounds that she was not mature and well-informed, and that the abortion was not in her best interest). The ruling does not specifically refer to Sav-A-Life as the required counseling center to which the judge referred the minor, but information gathered in interviews indicates that Sav-A-Life was in fact specified. Telephone Interview with Attorney representing minors in Ala. (Apr. 23, 2001); Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122. The ruling states that the juvenile court judge concluded that the minor had failed to demonstrate maturity in part by "her failure

life counseling in advance of a waiver hearing, the judge ordered a continuance so that the minors could receive Sav-A-Life counseling.<sup>132</sup>

While judges do not, to our knowledge, demand documentation that a minor has received Sav-A-Life counseling, the questioning a minor faces at her waiver hearing includes inquiries into whether she sought out such counseling. According to one judge,

Her lawyer will generally ask her, "What have you done? Did you go to Sav-A-Life? Have you considered the alternatives to abortion? . . . Have you heard both sides of the story, have you heard the pro-choice side and the pro-life side?" So, questions are to show that she's informed.<sup>133</sup>

Minors typically learn about this judicial requirement from attorneys appointed to represent them or from court intake officers who guide them through the waiver process. The judges "want the girls to go to Sav-A-Life," an attorney who represents minors during waiver proceedings said.<sup>134</sup> "I tell my girls this, and I tell them you can go and listen to what they have to say at Sav-A-Life, or we can appeal that. Most just go and get it over with. . . . I haven't had a girl say, 'No, I won't go' and instead challenge it."<sup>135</sup> Another attorney explained that some juvenile court judges "want to make sure [the minor] has spoken with pro-life agencies. That is a requirement, not an option. . . . Intake will send [the minor] to a pro-life agency, because they know the judges will want it."<sup>136</sup> After expressing the view that this requirement goes beyond the bounds of established legal precedent, this attorney said, "[T]hat doesn't change the reality that if that girl doesn't go to a pro-life agency before coming to that courtroom, she's not going to get her waiver. If intake doesn't send her, I will. In [the judge's] view it's an informed decision if they go . . ."<sup>137</sup>

The argument put forward in favor of requiring pro-life counseling usually emphasizes the importance of hearing all sides of the

to seek counseling from a facility that opposes abortion." *In re Anonymous*, 733 So. 2d at 431. The Court of Civil Appeals of Alabama reversed this ruling, explaining that "[a]lthough our supreme court has stated that a minor who *does* seek the advice of a pro-choice advocate thereby demonstrates *maturity*, it has never stated the converse—that a minor who *does not* seek the advice of a group opposed to abortion thereby demonstrates *immaturity*." *Id.* (citation omitted). Despite this reversal, the juvenile court judge continues to require pro-life counseling. Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122.

<sup>132</sup> Telephone Interview with Attorney representing minors in Ala., *supra* note 121; Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus, *supra* note 123.

<sup>133</sup> Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122. Some of the attorneys who participate in waiver hearings confirmed that minors face questions about whether they have visited a pro-life organization. For instance, according to one attorney, "I usually ask if they've been to any pro-life agencies." Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus, *supra* note 123.

<sup>134</sup> Telephone Interview with Attorney representing minors in Ala., *supra* note 131.

<sup>135</sup> *Id.*

<sup>136</sup> Telephone Interview with Attorney representing minors in Ala., *supra* note 121.

<sup>137</sup> *Id.*

abortion debate.<sup>138</sup> Should a minor receive counseling only from an abortion clinic, the argument goes, the information will be slanted in favor of abortion. Though a minor might learn the technical aspects of abortion from an abortion provider, the information will likely downplay the negative side of abortion. In addition, pro-life counseling will likely stress the alternatives to abortion and prove more informative on how to pursue those alternatives. A lawyer who has represented the interests of the fetus at waiver hearings defended the pro-life counseling requirement this way: "I think it's appropriate that she gets both sides of the issue, if she goes to the abortion clinic she gets a slant. If she goes to a pro-life clinic she gets a slant from that side."<sup>139</sup> Similarly, the director of a Sav-A-Life affiliate explained, "The family court judge calls occasionally and refers someone to us. . . . They know we tell the truth and present all the information about all the options."<sup>140</sup>

### C. Sav-A-Life, Inc.

Pregnant women in search of a Sav-A-Life center will find thirty-three affiliate offices in Alabama.<sup>141</sup> The largest crisis pregnancy organization in Alabama,<sup>142</sup> Sav-A-Life, Inc., was established in 1980.<sup>143</sup> Providing "positive alternatives to young women facing unplanned pregnancies,"<sup>144</sup> this non-profit organization offers free pregnancy tests and guidance on how to pursue alternatives to abortion.<sup>145</sup> Like other crisis pregnancy centers ("CPCs"), branch offices of Sav-A-Life frequently offer assistance with such things as maternity clothing,

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<sup>138</sup> See, e.g., Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus, *supra* note 123; Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122 (supporting the idea that hearing all sides is important in making an informed decision).

<sup>139</sup> Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus, *supra* note 123. The practice of appointing an attorney to act as guardian *ad litem* for the fetus has been adopted by some of the same judges who require pro-life counseling. The constitutionality of fetal representation in waiver hearings is taken up elsewhere. See Silverstein, *supra* note 119, at 91-108.

<sup>140</sup> Interview with Director of Sav-A-Life Affiliate 1, in Ala., *supra* note 127.

<sup>141</sup> See Sav-A-Life, Inc., Sav-A-Life Affiliates (on file with author). Sav-A-Life also has more than twenty offices in Florida, Georgia, Louisiana, Mississippi, and Tennessee. *Id.* Affiliate offices operate independently of each other, but each accepts a "common Statement of Faith and Guiding Principles." See Sav-A-Life, Inc., About Us [hereinafter Sav-A-Life, About Us] (on file with author) (establishing Mission Statement and goals of Sav-A-Life).

<sup>142</sup> Beyond Sav-A-Life affiliates, we found ten other crisis pregnancy centers ("CPCs") in Alabama. See *infra* Part IV.C.

<sup>143</sup> See Sav-A-Life, About Us, *supra* note 141.

<sup>144</sup> *Id.*

<sup>145</sup> See Sav-A-Life, Home Page, *supra* note 20.

baby clothing, toys, diapers, formula, and other child-rearing accessories.<sup>146</sup>

Sav-A-Life's mission is unambiguously religious. A self-described "non-denominational, Christ-centered ministry,"<sup>147</sup> Sav-A-Life's mission, according to the most recent version of the organization's Web site, "is to establish and equip Pregnancy Centers in order that communities will be reached for Christ and that abortion will be made unnecessary and undesirable in their region."<sup>148</sup> Sav-A-Life aims to accomplish this through "a commitment to evangelism and Biblical Truth."<sup>149</sup>

Affiliate offices of Sav-A-Life adhere to the organization's religious mission. For example, according to the Web site of Sav-A-Life East, Inc., located in Birmingham,

We are an evangelical Christian ministry and our volunteers come from many different denominations which agree on the basic tenants [sic] of the Christian faith. An emphasis is placed on the belief that God loves every client that walks into our office, unconditionally, right where she is. Our first concern is for *her*, a possible pregnancy and baby is secondary. Each is a Divine appointment and our volunteers must feel called to this ministry and make it a high priority in their life.<sup>150</sup>

Other Sav-A-Life affiliates include prayer recommendations on their Web sites. While some, such as the West Alabama Sav-A-Life, put this recommendation forward only in general terms,<sup>151</sup> others provide specific prayer advice. For example, the Pregnancy Test Center in Oneonta offers on its website a discussion of abortion that recommends that pregnant women

review the fetal development of the baby to see that it is truly a new life which is not your own. If you are a Christian, you should consider what God's word (the Bible) says about abortion. God says, "I have set before you life or death, so choose life."<sup>152</sup>

<sup>146</sup> *Id.*

<sup>147</sup> See Sav-A-Life, About Us, *supra* note 141.

<sup>148</sup> Sav-A-Life, Inc., Our Mission (on file with author).

<sup>149</sup> See Sav-A-Life, About Us, *supra* note 141. An earlier rendition of Sav-A-Life's Web site explained that the services offered by the organization include "Evangelism, Discipleship and Bible Study." See Sav-A-Life, Home Page, *supra* note 20.

<sup>150</sup> Sav-A-Life E., Inc., Be a Volunteer, at <http://www.sav-a-life-east.org/volunteer.htm> (last visited Oct. 27, 2004). The website further states: "We believe when a mother is given *truthful, positive* information about the development of the unborn baby and what an abortion will do to it, along with God's unconditional love, she will be better equipped to make a choice that she will not later regret." Sav-A-Life E., Inc., About Us, at <http://www.sav-a-life-east.org/about.htm> (last visited Oct. 27, 2004).

<sup>151</sup> See W. Ala. Sav-A-Life (advising those wishing to serve the organization to "pray consistently for Sav-A-Life"), at <http://www.westal.net/sav-a-life/page2.htm> (last visited Oct. 27, 2004).

<sup>152</sup> OurChurch.com, Oneonta Pregnancy Test Center (on file with author).



A listing of eight Bible verses follows this recommendation, including Jeremiah 1:5, "Before I formed you in the womb I knew you," and Exodus 23:7, "do not put an innocent . . . person to death."<sup>153</sup>

Further evidence of the overarching religious mission of Sav-A-Life comes from information gathered during on-site interviews with directors of six Sav-A-Life affiliates.<sup>154</sup> The interviews reveal that these CPCs ground their counseling on religious principles, and counselors seek to realize the organization's evangelical mission by witnessing to clients and sharing the gospel.

According to the director of one affiliate, "Our mission is to share the gospel of Lord Jesus Christ with women who are in crisis pregnancy and to do that with services we offer."<sup>155</sup> Although the director made clear that no one is "forced" to hear the gospel, she said, "We seek to share the gospel with everyone who walks through the door."<sup>156</sup> The director further explained, "There are 100,000 ways to do that. A lot of times at root I say I'm interested in her as a woman, as a person. But I'm interested in her spiritual well-being. So I simply, I'll ask about her relationship with Christ, where she stands in her thinking."<sup>157</sup>

In response to the query of how those facing unwanted pregnancies are counseled, a second director commented,

All of our counsel is from a biblical basis. Our view is that the Bible is true. All our counselors are Christian. All our counsel is based on what He says, that is, what God says. And God for us is Jesus. All our counsel is based on the word of God. . . .

. . . .

. . . We tell her that God loves her, that He has blessed her if the test is positive, even if it may not look like a blessing.<sup>158</sup>

After further explaining that counseling of pregnant women can emphasize the emotional, physical, and spiritual aspects of abortion, this director went on to say that the counselors at her organization emphasize spirituality. "We're very evangelical. We present the gospel to them. . . . [W]e keep track of who has received Christ. We ask about spirituality, whether they believe in Christ, whether they're an unbeliever, whether they've committed their life to Christ."<sup>159</sup> Furthermore, this director remarked that women are told, "God can turn this around if she lets them. God has allowed the sperm and the egg to unite. . . . Also there's another force and that's Satan and he's

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<sup>153</sup> *Id.*

<sup>154</sup> See *supra* note 120 and accompanying text.

<sup>155</sup> Interview with Director of Sav-A-Life Affiliate 3, in Ala. (July 21, 2003).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Interview with Director of Sav-A-Life Affiliate 4, in Ala. (July 21, 2003).

<sup>159</sup> *Id.*

looking to kill and destroy, and Satan is trying to get a foothold in their lives."<sup>160</sup>

The director of a third Sav-A-Life affiliate explained the organization's evangelical mission in this way: "We're a Christian ministry and we share the gospel. God doesn't have to hold anybody down. Jesus is a gentleman. He knocks. I can't change a heart or a life, but I can introduce them to someone who can change a heart or a life."<sup>161</sup> Describing the method adopted to share the gospel, this director said:

We use evangelism explosion here. It was introduced by D.J. Kennedy of Coral Ridge Presbyterian Church in Florida. It's a method of evangelism. There are several different methods. In this one we ask, If you die tonight, will you go to heaven? . . . And then we say God loves them. No man is perfect. Jesus was perfect. God loves them but he's just and will punish sins. We tell them . . . Jesus lived a perfect life, and he died on the cross. He paid the debt for our sins. He rose on the third day. We accept that in faith and what Jesus did on the cross will get us to heaven.<sup>162</sup>

At a fourth Sav-A-Life affiliate, the director remarked that while the spiritual emphasis of counseling might vary from client to client, "We witness to every client we counsel. We witness to every client at least once."<sup>163</sup> Asked to elaborate on what witnessing involves, this director said,

We have gospel tracts we go by. We're all different denominations so we do different things. But we stick to the basic plan of salvation. There are a lot of differences between what I believe and what a Catholic believes. But we ask them if they believe in heaven or hell and if they die will they go to heaven or hell and if they've received God. We'll show the Bible and [say the] only help is [a] relationship with Jesus Christ and they can accept that or they can not. If they accept, we give them a Bible and we try to get them to go to church.<sup>164</sup>

A client who expresses the view that she will go to heaven because she is a good person will be told that gaining entry to heaven requires more.<sup>165</sup> In particular, counselors at this affiliate tell clients that accepting Jesus Christ as one's savior is necessary for admission into heaven.<sup>166</sup>

The director of another Sav-A-Life affiliate said,

We provide services for free so that we can show God's love and can share with them God's word. We don't push them to receive Christ. We tell

<sup>160</sup> *Id.*

<sup>161</sup> Interview with Director of Sav-A-Life Affiliate 5, in Ala. (July 22, 2003).

<sup>162</sup> *Id.*

<sup>163</sup> Interview with Director of Sav-A-Life Affiliate 2, *supra* note 128.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

them you can do it today or at home at night. We have a tract that we'll go over with them. I'll give them a choice. Do you want me to lead them in a prayer. I'll tell them how to contact church.<sup>167</sup>

By way of further explaining the organization's religious mission, this director shared the following anecdote:

We had a situation where a boyfriend called, and he complained that we talked to his girlfriend about her relationship with God and church. He said religion is a private thing. I said, you know, your girlfriend came in and read the intake form and knew that we're a Christian ministry. The reason the church supports us and gives us money is because we're going to talk about God. You telling us not to talk about Jesus Christ is like going to Papa John's [Pizza] and asking for ice cream.<sup>168</sup>

Several directors confirmed that affiliates must accept Sav-A-Life's Statement of Faith, Guiding Principles, and Activism Policy, documents that exhibit the organization's evangelical imperative.<sup>169</sup> The Statement of Faith expresses belief in, among other things, the Old and New Testament, the Trinity, the death of Jesus Christ for the sins of others, the physical resurrection of Jesus Christ, and the second coming of Christ.<sup>170</sup> Those who sign the statement "believe that all who receive by faith the Lord Jesus Christ are born of the Holy Spirit and thereby become children of God, and there is no other way of salvation," and "believe in the great commission which our Lord has given His Church to evangelize the world, and that this evangelization is the great mission of the church."<sup>171</sup> Signers accept that it is their "Christian duty to witness by word and deed to these truths."<sup>172</sup>

The Guiding Principles document indicates that Sav-A-Life is a "Christian alternative [sic] to abortion . . . it is our desire that we be used of God as a tool in spreading the Good News."<sup>173</sup> The statement lists twelve points, including, among other things, that the organization "is committed to helping fulfill the Great Commission and will endeavor to introduce its clients to Jesus Christ as Savior and Lord."<sup>174</sup>

<sup>167</sup> Interview with Director of Sav-A-Life Affiliate 6, in Ala. (July 21, 2003).

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., Interviews with Directors of Sav-A-Life Affiliates, *supra* notes 127–28, 155, 158, 161, 167. According to one director, "It's standard procedure for affiliates to sign the statement of faith and guiding principles." Interview with Director of Sav-A-Life Affiliate 1, *supra* note 127. In addition, according to the website of Sav-A-Life East, Inc., "Each Sav-A-Life affiliate is totally independent from any other, as most Pregnancy Test Centers are. We abide by a common Statement of Faith and Guiding Principles." Sav-A-Life E., Inc., About Us, at <http://www.savlifeeast.org/about.htm> (last visited Oct. 29, 2004).

<sup>170</sup> SAV-A-LIFE, INC., STATEMENT OF FAITH 1 (2004) (on file with author) [hereinafter STATEMENT OF FAITH].

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> SAV-A-LIFE, INC., GUIDING PRINCIPLES 1 (2004) (on file with author) [hereinafter GUIDING PRINCIPLES].

<sup>174</sup> *Id.*

The organization's Activism Policy aims primarily at ensuring that Sav-A-Life volunteers refrain from taking part in sidewalk counseling and rescues at abortion clinics.<sup>175</sup> Yet it, too, underscores the importance of the evangelical mission: "God has given Sav-A-Life the responsibility to witness, counsel, and test the women in our community."<sup>176</sup>

Those who volunteer at Sav-A-Life must sign each of these statements.<sup>177</sup> Thus, as one director remarked, being Christian "is a requirement" for those who wish to volunteer.<sup>178</sup> This prerequisite is manifest in the questions posed on a volunteer counselor application used by at least one Sav-A-Life office.<sup>179</sup> Among other things, that application form asks:

In Your Opinion, how does a person become a Christian? (Briefly explain)

What is your attitude toward personal evangelism?

Are you willing to be trained in personal evangelism?

In your words, what is Christian counseling?<sup>180</sup>

This application form also asks prospective volunteers to write their "personal testimony" by offering the following account:

Before I received Christ, I lived and thought this way:

How I received Christ (Please be specific):

After I received Christ, these are the changes that took place in my life:<sup>181</sup>

Along with the common requirement that volunteers accept Christ, at least some branches of Sav-A-Life track whether clients have "received Christ."<sup>182</sup> While those interviewed were not questioned as to whether they document the number of clients who receive Christ, some made reference to such documentation. Implying that Sav-A-Life affiliates track and even share this information, one director said, "Our numbers of [clients] receiving Christ are not as high as other Sav-A-Life centers."<sup>183</sup> Another director presented the following data: "Historically, about ten to twelve percent pray with us or say they've committed their life to Christ. Over twelve years, we've given 8905

<sup>175</sup> SAV-A-LIFE, INC., ACTIVISM POLICY 1 (2004) (on file with author).

<sup>176</sup> *Id.*

<sup>177</sup> Interview with Director of Sav-A-Life Affiliate 4, *supra* note 158.

<sup>178</sup> Interview with Director of Sav-A-Life Affiliate 2, *supra* note 128.

<sup>179</sup> Responding to a routine question posed to all those interviewed about how Sav-A-Life affiliates secure volunteers to work as counselors, one of those interviewed offered to share a copy of the volunteer counselor application used by that office. We did not, however, request the application form used by other affiliates. Therefore, we cannot say whether all Sav-A-Life affiliates use a similar application.

<sup>180</sup> SAV-A-LIFE, INC., VOLUNTEER COUNSELOR APPLICATION 1-2 (2003) (on file with author).

<sup>181</sup> *Id.* at 3.

<sup>182</sup> Interview with Director of Sav-A-Life Affiliate 4, *supra* note 158.

<sup>183</sup> Interview with Director of Sav-A-Life Affiliate 6, *supra* note 167.

pregnancy tests; 2744 tested positive; 5749 were single; 1014 prayed to receive Christ or commit their life to him."<sup>184</sup>

The physical décor of the Sav-A-Life affiliate offices that we visited offers further evidence of the overtly religious character of the organization. Religious imagery is virtually ubiquitous and takes multiple forms. Religious displays—including drawings, paintings, and figurines of Jesus Christ, the Virgin Mary, and angels—grace walls, desks, and tabletops. Bibles can typically be found in counseling rooms. Crosses, though less prevalent than other religious symbols, adorn the walls of some offices. Psalms, Bible verses, and other prayers often accompany religious depictions or stand on their own. At one office, for example, a verse from Luke appears alongside a saccharine drawing of a young child, while at another office a large embroidery of the Lord's Prayer hangs just outside the entry to one of the counseling rooms.

Although we did not visit each of the Sav-A-Life offices in Alabama, the information we obtained from those we did visit, combined with the publicly available information about the organization, plainly demonstrates that Sav-A-Life affiliate offices primarily serve to advance the organization's Christ-centered evangelical mission. As one director put it when explaining whether the organization might apply for a government grant under new faith-based funding, "we would never apply for such a grant if we thought it would compromise our faith. First and foremost we're a Christian ministry."<sup>185</sup>

### III. ESTABLISHMENT CLAUSE CONSIDERATIONS IN MANDATED SAV-A-LIFE COUNSELING

We now turn to a consideration of how current Establishment Clause precedent applies to the Sav-A-Life counseling requirement.

#### A. *The Lemon Test*

##### 1. *The Purpose Prong*

To satisfy the first prong of the *Lemon* test, mandated Sav-A-Life counseling must serve a secular purpose.<sup>186</sup> Under *Lemon's* first prong, "a court may invalidate a statute only if it is motivated wholly by an impermissible purpose."<sup>187</sup> Because mandated counseling from

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<sup>184</sup> Interview with Director of Sav-A-Life Affiliate 4, *supra* note 158.

<sup>185</sup> Interview with Director of Sav-A-Life Affiliate 1, *supra* note 127. Sav-A-Life's Web site also notes that the organization is "a non-profit, non-denominational, Christ-centered ministry that receives no government funding." Sav-A-Life, About Us, *supra* note 141.

<sup>186</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>187</sup> *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

Sav-A-Life is a judicially constructed requirement, we cannot look to such things as the legislative record to discern the purpose behind the requirement. We have only the specific motives of those judges who require such counseling.

The expressed motivations of these judges are two-fold. As discussed above, judges contend that pro-life counseling, when offered in conjunction with counseling provided by abortion clinic personnel, ensures balanced information on pregnancy options.<sup>188</sup> Some judges also acknowledge that they hope Sav-A-Life counseling will encourage minors to choose childbirth over abortion. As one judge explained, sending minors to Sav-A-Life will "hopefully . . . make them see that abortion is not the right decision, because I believe it is the wrong decision."<sup>189</sup>

While we suspect that these judges' views are based on religious beliefs, we lack sufficient evidence to prove this point.<sup>190</sup> Moreover, it is arguable that the judges' stated goals stand up as secular whether or not they arise from some deeper religious conviction. Whether judges aim to ensure balanced information or to encourage childbirth, these goals serve a secular purpose. In light of these considerations, we grant, for the sake of the argument at least, that mandated Sav-A-Life counseling passes the first prong of the *Lemon* test.

## 2. *The Effects Prong*

To meet *Lemon's* second prong, the conduct in question "must have a . . . principal or primary effect . . . that neither advances nor inhibits religion."<sup>191</sup> Among the ways in which government conduct would impermissibly advance religion is when that conduct supports religious indoctrination. In *School District v. Ball*,<sup>192</sup> the Court explained:

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. Such indoctrination, if permitted to occur, would have dev-

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<sup>188</sup> See discussion *supra* Part II.B.

<sup>189</sup> Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122.

<sup>190</sup> We did turn up some evidence that lends itself to the conclusion that religion inspires some of these judges. For example, referring to one of the judges, a respondent said, "He is very religious. And he doesn't want to grant these things." Telephone Interview with Ala. Attorney who acts as guardian *ad litem* for the fetus (May 16, 2001). However, our data do not provide adequate grounds for arriving at the conclusion that a sectarian purpose motivates the counseling mandate.

<sup>191</sup> *Lemon*, 403 U.S. at 612.

<sup>192</sup> *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (invalidating two educational programs in which the Grand Rapids, Michigan public school system financed and offered classes in sectarian schools to students of those schools).

astating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism.<sup>193</sup>

Government-sponsored religious indoctrination remains absolutely forbidden under the Establishment Clause. However, the rules for assessing the likelihood of indoctrination have been relaxed since the Court's ruling in *Ball*.<sup>194</sup> In its earlier decisions, the Court seemed to accept the presumption that direct support of sectarian institutions by government unjustifiably risked the inculcation of religious values with the state's blessing.<sup>195</sup> In more recent decisions the Court has refused routine acceptance of this presumption.<sup>196</sup>

Particularly relevant for our discussion is the ruling in *Bowen v. Kendrick*,<sup>197</sup> where the Court rested its denial of the facial challenge to AFLA in part on a rejection of this presumption. Acknowledging earlier holdings that invalidated programs "that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid,"<sup>198</sup> the Court nevertheless held that Congress may fund religiously affiliated institutions that provide education and counseling services to adolescents. "[N]othing in our prior cases," the Court explained, "warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner."<sup>199</sup> The Court further explained that "a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions."<sup>200</sup> Distinguishing between merely sectarian institutions and those that are pervasively sectarian, the Court in *Bowen* held:

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<sup>193</sup> *Id.* at 385 (citations omitted).

<sup>194</sup> See *Agostini v. Felton*, 521 U.S. 203, 223 (1997) ("As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Agular* have, however, modified in two significant respects the approach we use to assess indoctrination.").

<sup>195</sup> In *Ball*, for example, the Court's finding of an Establishment Clause violation rested in part on the assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination." *Agostini*, 521 U.S. at 222.

<sup>196</sup> See, e.g., *Agostini*, 521 U.S. at 223 (stating that the court has abandoned the presumption that "the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination").

<sup>197</sup> 487 U.S. 589 (1988).

<sup>198</sup> *Id.* at 612.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 610.

Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion.<sup>201</sup>

In so holding, the Court concluded that, as long as the religiously affiliated grantees prove not to be "pervasively sectarian,"—that is, institutions "in which the secular cannot be separated from the sectarian,"<sup>202</sup> or, put otherwise, where "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission"<sup>203</sup>—the presumption of state-sponsored religious indoctrination can be rejected. Furthermore, the *Bowen* Court remanded the case with respect to whether AFLA could withstand an "as applied" challenge: "In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be."<sup>204</sup>

*Bowen* addresses government funding of religious organizations, not counseling mandates. Nevertheless, the ruling demonstrates the Court's current reluctance to presume that direct government support of sectarian organizations will inevitably lead to religious indoctrination, and our assessment of whether court-mandated Sav-A-Life counseling constitutes religious indoctrination must take the Court's recent shift into account.

As it pertains to the issue of indoctrination relative to the instant issue, the upshot of *Bowen* is that government may, as part of a religiously neutral program, directly sponsor religiously affiliated institutions with the aim of encouraging those institutions to provide education and counseling services to adolescents.<sup>205</sup> However, those alleging that such sponsorship constitutes impermissible religious in-

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<sup>201</sup> *Id.* at 612 (citation omitted).

<sup>202</sup> Margo R. Drucker, Comment, *Bowen v. Kendrick: Establishing Chastity at the Expense of Constitutional Prophylactics*, 64 N.Y.U. L. REV. 1165, 1178 (1989).

<sup>203</sup> *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

<sup>204</sup> *Bowen*, 487 U.S. at 621. The Court also offered this guidance for approaching an "as applied" consideration: "Here it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." *Id.*

<sup>205</sup> This is distinct from the upshot of later rulings that permit direct government sponsorship of religiously affiliated institutions where the educational services are provided in the religious institutions but by public employees. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (refusing to hold invalid under the Establishment Clause a federally funded program designed to provide remedial instruction by public employees at a religious institution); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) ("[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school.").



doctrination can show a constitutional violation by demonstrating that the particular religious organization receiving government support is pervasively sectarian.<sup>206</sup>

While precedent holds that religious inspiration or affiliation with a religious institution does not by itself make an organization pervasively sectarian,<sup>207</sup> Sav-A-Life's evangelical imperative makes it impossible to imagine that the sectarian character of the organization is less than pervasive.<sup>208</sup> According to the group's Statement of Faith, all affiliates and volunteers—who are required to sign the Statement—“believe that all who receive by faith the Lord Jesus Christ are born of the Holy Spirit and thereby become children of God, and there is no other way of salvation,” and “believe in the great commission which our Lord has given His Church to evangelize the world, and that this evangelization is the great mission of the church.”<sup>209</sup> Signers thereby embrace their “Christian duty to witness by word and deed to these truths.”<sup>210</sup>

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<sup>206</sup> While this is not the only way impermissible religious indoctrination can be proven, *Bowen* explains that this is one way of establishing such proof. See *supra* notes 200–01 and accompanying text.

<sup>207</sup> In *Bowen*, the Court held that “it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is ‘religiously inspired.’” *Bowen*, 487 U.S. at 621. And according to standing precedent, the mere finding that an organization undertakes a religiously based mission does not, without more, make that organization pervasively sectarian. Consider in this regard cases that have upheld government funding of religiously affiliated institutions of higher education. In *Tilton v. Richardson*, the Court permitted government funding of church-related colleges and universities, including several schools governed by Catholic religious organizations (e.g., Sacred Heart University, Fairfield University, and Albertus Magnus College). 403 U.S. 672, 686–87 (1971). In *Hunt v. McNair*, the Court upheld a funding program that permitted grant allocation to the Baptist College at Charleston, an institution of higher learning governed in part by the South Carolina Baptist Convention. 413 U.S. at 743. In *Roemer v. Board of Public Works*, the Court sanctioned sizable financial disbursements to four Roman Catholic affiliated colleges located in Maryland: The College of Notre Dame, Mount Saint Mary's College, Saint Joseph College, and Loyola College. 426 U.S. 736, 744 (1976). In none of these cases did the Court find these institutions to be pervasively sectarian. But, without doubt, these institutions have at their foundation a religious mission. For example, according to Sacred Heart University's mission statement, the University “is Catholic in tradition and spirit. As a Catholic university, it seeks to play its appropriate role in the modern world. It exemplifies in its life the Judeo-Christian values of the God-given freedom and dignity of every human person.” Sacred Heart Univ., Mission Statement, at <http://www.sacredheart.edu/about/mission/index.html> (last visited Oct. 29, 2004).

<sup>208</sup> Our conclusion that Sav-A-Life is pervasively sectarian is not necessary to our finding that mandated Sav-A-Life counseling from the affiliates we interviewed leads to efforts to indoctrinate minors. With respect to the Sav-A-Life affiliates we interviewed, the evidence concerning the evangelical character of the counseling demonstrates that the risk of indoctrination is real. Our conclusion that Sav-A-Life is pervasively sectarian does, however, provide the grounding to generalize about the risk of indoctrination at all Sav-A-Life affiliates, thereby permitting us to draw organization-wide conclusions about the constitutional effect of the counseling mandate.

<sup>209</sup> STATEMENT OF FAITH, *supra* note 170, at 1.

<sup>210</sup> *Id.*

Moreover, interviews with affiliate directors leave no doubt that Christianity guides all Sav-A-Life activities.<sup>211</sup> These directors attest to the central and indispensable role religion plays in their organization. Indeed, these directors were not shy in revealing that the defining characteristic of their organization is sharing the gospel. As one director put it, "Our mission is to share the gospel of Lord Jesus Christ with women who are in crisis pregnancy and to do that with services we offer."<sup>212</sup>

While the meaning of "pervasively sectarian" is open to interpretation,<sup>213</sup> if the extension of the concept depicted by the expression does not extend to an organization committed to "introduc[ing] its client's [sic] to Jesus Christ as Savior and Lord,"<sup>214</sup> then we must regrettably admit that we have absolutely no grasp of the meaning of the expression.

<sup>211</sup> See *supra* Part II.C.

<sup>212</sup> Interview with Director of Sav-A-Life Affiliate 3, *supra* note 155.

<sup>213</sup> As Justice Blackmun said, the notion of pervasively sectarian is "a vaguely defined term of art." *Bowen v. Kendrick*, 487 U.S. 589, 631 (1988) (Blackmun, J., dissenting). Justice Kennedy, concurring in *Bowen* and acknowledging judicial precedent that considers the extent of sectarianism, offered this comment: "I am not confident that the term 'pervasively sectarian' is a well-founded juridical category." *Id.* at 624 (Kennedy, J., concurring). Precedent does, however, provide us with some examples of pervasively sectarian institutions. It tells us that parochial schools at the elementary and secondary level count as pervasively sectarian institutions. See, e.g., *id.* at 621 (noting that the Court has considered parochial schools to be pervasively sectarian). By contrast, religiously affiliated institutions of higher education are not necessarily pervasively sectarian. See, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 759 (1976) (finding the institutions at issue "not 'so permeated by religion that the secular side cannot be separated from the sectarian'"); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) ("The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."). The difference, the Court has said, has to do with whether religion so permeates the institutions that their religious and secular functions are inseparable. *Roemer*, 426 U.S. at 750. As Justice Thomas explained, the Court "invented the 'pervasively sectarian' test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities." *Columbia Union Coll. v. Clark*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from the denial of certiorari).

In addition to this distinction, precedent points to certain characteristics that can be used in assessing the degree of sectarianism of particular institutions. According to Margo R. Drucker, these characteristics include

whether there are religious restrictions on admission, or whether a large proportion of attending individuals are of one religious denomination; whether there is adherence to religious dogma; whether there is attendance at religious services; in the case of a school, whether a particular religious doctrine is studied and whether there are restrictions on what and how the faculty must teach; whether religious indoctrination is a substantial purpose of the institution; whether members of religious orders direct programs; and whether programs are conducted in rooms adorned with religious symbols.

Drucker, *supra* note 202, at 1178 (footnotes omitted).

<sup>214</sup> GUIDING PRINCIPLES, *supra* note 173, at 1.

Were *Bowen* the sole controlling precedent, we could readily conclude that mandated Sav-A-Life counseling constitutes government-sponsored religious indoctrination and hence fails the second prong of *Lemon*. However, recent cases further modify the jurisprudence of indoctrination, revealing the Court's increasing unwillingness to presume religious indoctrination—even in the context of aid that flows to pervasively sectarian institutions.

In *Zobrest v. Catalina Foothills School District*, the Court upheld the use of a state-employed sign-language interpreter in a Roman Catholic high school.<sup>215</sup> In *Agostini v. Felton*, the Court allowed public school teachers to provide remedial education and counseling to students in parochial schools.<sup>216</sup> Rejecting the presumption that publicly employed interpreters or instructors would, by virtue of the pervasively sectarian surroundings, inculcate religion, the Court upheld both of the challenged aid programs.<sup>217</sup> As the Court explained in *Zobrest*, “[w]hen the government offers a neutral service on the premises of a sectarian school as part of a general program that ‘is in no way skewed towards religion,’ it follows under our prior decisions that provision of that service does not offend the Establishment Clause.”<sup>218</sup> Furthermore, the Court argued that the record failed to suggest “that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole.”<sup>219</sup> The Court presented a similar argument in *Agostini*:

[T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures.<sup>220</sup>

*Zobrest* and *Agostini* significantly advance the Court's accommodationist stance. Nevertheless, it is clear that these cases do not engage the issue of mandated Sav-A-Life counseling. Unlike the educational services sanctioned in *Zobrest* and *Agostini*—services offered by public employees who come to their positions not by virtue of any religious leanings—the pro-life counseling available at Sav-A-Life is offered by private individuals who embrace, and, indeed, are required to em-

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<sup>215</sup> 509 U.S. 1, 3 (1993).

<sup>216</sup> 521 U.S. 203, 208–09 (1997).

<sup>217</sup> See *Agostini*, 521 U.S. at 224; *Zobrest*, 509 U.S. at 12.

<sup>218</sup> 509 U.S. at 10 (citation omitted).

<sup>219</sup> *Id.* at 13.

<sup>220</sup> 521 U.S. at 226.

brace, the evangelical mission of the ministries.<sup>221</sup> There is an enormous difference between the public employees who performed secular functions for the pervasively sectarian institutions in *Zobrest* and *Agostini* and the committed evangelicals performing arguably secular functions in the context of the pervasively sectarian institution at issue here. *Zobrest* and *Agostini* encourage faith in the ability of public employees to avoid engaging in religious indoctrination. But they do not speak to the behavior of committed religious employees of pervasively sectarian organizations.<sup>222</sup> Therefore, these cases do not change our conclusion, directed by *Bowen*, that mandated Sav-A-Life counseling constitutes impermissible government indoctrination of religion.

### 3. *The Excessive Entanglement Prong*

If we have rightly characterized Sav-A-Life as pervasively sectarian, then mandated pro-life counseling fails the third prong of *Lemon*, which forbids "excessive entanglement between church and state."<sup>223</sup> Though a precise definition of "excessive entanglement" is hard to come by in Supreme Court precedent, considerations surrounding this prong typically attend to the tangible connections between church and state, such as administrative oversight of religious institutions that accompanies funding programs.<sup>224</sup> The Court also consid-

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<sup>221</sup> See, e.g., CARE NET, PREGNANCY CENTER AFFILIATION PACKAGE (stating the requirement that counselors embrace Care Net's evangelical mission), at <http://www.care-net.org/membership/affiliation.pdf> (last visited Oct. 30, 2004).

<sup>222</sup> The holding in *Lemon* does speak directly to the behavior of committed religious employees of pervasively sectarian organizations, and recent modifications in indoctrination precedent have not altered the *Lemon* Court's conclusion that "[w]e cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education." *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971). Careful not to imply that teachers would intentionally violate the Establishment Clause, the *Lemon* Court explained:

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.

*Id.* at 618–19.

<sup>223</sup> *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). While there has been some discussion in recent cases as to whether the excessive entanglement consideration should be taken up separately or as part of the effects prong of *Lemon*, see, e.g., *Agostini*, 521 U.S. at 232; *supra* notes 51–52 and accompanying text, we will treat entanglement on its own.

<sup>224</sup> See, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764 (1976) (discussing state audits of religiously affiliated colleges receiving public aid); *Hunt v. McNair*, 413 U.S. 734, 736 (1973) (discussing revenue bonds benefiting a Baptist-controlled college); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (discussing federal construction grants for church-related schools); *Lemon*, 403 U.S. at 607 (discussing state funding for secular education in non-public schools).

ers government surveillance of the content of religious activities to be problematically entangling. Thus, for example, when overturning the two separate state funding statutes at issue in *Lemon*, the Court argued that

[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities<sup>225</sup> in order to ensure that state aid supports only secular education.

While the Court overturned as excessively entangling the statutes under consideration in *Lemon*, later rulings have permitted a substantial degree of interaction between government and religious institutions. The Court in *Bowen* found “no excessive entanglement where government reviews the adolescent counseling programs set up by religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits.”<sup>226</sup> The Court in *Roemer v. Board of Public Works* sanctioned the flow of public aid to four Roman Catholic affiliated colleges and rejected an excessive entanglement claim even though the state conducted annual audits to prevent the schools from using the grants to teach religion.<sup>227</sup> In *Agostini*, the Court upheld a remedial education program provided by public school teachers in private sectarian schools that included unannounced monthly visits by public supervisors to prevent inculcation of religion by those teachers.<sup>228</sup>

Given the degree of entanglement permitted by standing precedent, there might seem to be little question that mandated Sav-A-Life counseling survives the third prong of *Lemon*. While courts provide the affiliates’ names and contact information, they do not, as far as we know, monitor these centers. In fact, it is difficult to find any tan-

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<sup>225</sup> 403 U.S. at 616. Justice Brennan, concurring in *Lemon*, “provided what may be an even more apt characterization of the problems of entanglement:

Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental “secularization of a creed.”

*Id.* at 650 (Brennan, J., concurring).

<sup>226</sup> 487 U.S. at 615–17.

<sup>227</sup> 426 U.S. at 764–65.

<sup>228</sup> 521 U.S. at 234.

gible entanglement, let alone excessive entanglement, between the courts that mandate pro-life counseling and Sav-A-Life affiliates.<sup>229</sup>

Nevertheless, the mandate fails the third *Lemon* prong. This failure stems, ironically, from the lack of government supervision and from what constitutionally required government supervision would entail. Given that evangelical Christian ministries provide the mandated counseling, "to ensure that religion is not advanced would require extensive and continuous monitoring and direct oversight of every counseling session."<sup>230</sup> But such monitoring and oversight would create excessive entanglement, thereby violating First Amendment prohibitions.<sup>231</sup>

This argument contributed to the district court holding in *Bowen* that AFLA ran afoul of the Establishment Clause.<sup>232</sup> However, the argument did not in that context convince the Supreme Court to affirm the lower court's finding. The Court acknowledged as a "Catch-22" the argument that "the very supervision of the aid to assure that it does not further religion renders the statute invalid."<sup>233</sup> Still, the Court did not reject the argument that a government policy necessitating extensive and continuous monitoring of a religious institution would generate excessive entanglement.<sup>234</sup> Instead, the Court's unwillingness to concur with the district court's finding in *Bowen* turned on the extent of religious sectarianism.

[T]here is no reason to assume that the religious organizations which may receive grants are "pervasively sectarian" in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees. . . . [I]n our view, this type of grant monitoring does not amount to "excessive entanglement," at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily "pervasively sectarian."<sup>235</sup>

Following the Court's reasoning to its conclusion and applying it to the context of mandated counseling from Sav-A-Life, when grounds exist for assuming that government supported religious organizations are pervasively sectarian—as is the case with Sav-A-Life—

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<sup>229</sup> We, of course, do not have complete information about the relationship, if any, between the courts and Sav-A-Life. And it is possible that more entanglement than we have knowledge of exists. But, even if we grant that the tangible connections between the courts and Sav-A-Life are negligible, this does not mean that the counseling mandate survives the third prong of *Lemon*.

<sup>230</sup> *Kendrick v. Bowen*, 657 F. Supp. 1547, 1568 (D.D.C. 1987).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988).

<sup>234</sup> *Id.* at 616–17.

<sup>235</sup> *Id.*

more intensive monitoring would be required to protect against the risks of indoctrination. This, in turn, would foster excessive entanglement by virtue of the necessary government intrusion into the operations of this religious organization.<sup>236</sup>

### B. The Coercion Test

"There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to force one to profess a religious belief or participate in a religious activity."<sup>237</sup> This principle underlies the coercion test and proscribes government policies that coerce anyone to support or participate in religion or its exercise.<sup>238</sup>

The coercive aspect of the counseling mandate is straightforward. Judges who send minors to Sav-A-Life condition their waiver grants on the receipt of pro-life counseling. Given what minors seek from judges, namely a waiver of the parental consent requirement, and that minors have a constitutionally guaranteed right to petition for such a waiver,<sup>239</sup> this condition constitutes compulsion.

The only way to construe mandated counseling in a non-coercive light is to suggest that minors have another option available to avoid participation in such counseling. In *Lee*, petitioners claimed that the option of not attending the graduation ceremony where a brief prayer was given mitigated the potential for coercion.<sup>240</sup> One could similarly say that a minor has the option of discussing her pregnancy with her parents, and it is only her choice not to do so that leads to the waiver application and the mandated pro-life counseling. In other words, the requisite counseling comes only in the context of a choice by minors to seek an avenue around parental involvement.

This argument lacks merit. Writing on behalf of the Court in *Lee*, Justice Kennedy said, "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."<sup>241</sup> Furthermore, the Court reasoned,

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<sup>236</sup> In *Agostini*, the Court reiterated the position that a government program causes excessive entanglement when it requires "pervasive monitoring by public authorities" to protect against religious inculcation. 521 U.S. 203, 233 (1997).

<sup>237</sup> *Griffin v. Coughlin*, 673 N.E.2d 98, 105 (N.Y. 1996).

<sup>238</sup> See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (finding that the Constitution guarantees that the government may not coerce anyone to support or participate in religion).

<sup>239</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bellotti II*, 443 U.S. 622 (1979).

<sup>240</sup> *Lee*, 505 U.S. at 594-95 ("Petitioners and the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself.").

<sup>241</sup> *Id.* at 596.

to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and her high school years.<sup>242</sup>

If persuasive in *Lee*, this argument is even more persuasive in the context of implementing parental consent statutes. Whereas the forfeiture in *Lee* included what the Court referred to as "intangible benefits,"<sup>243</sup> with respect to parental consent statutes, a minor's constitutionally recognized right to choose abortion hangs in the balance. A minor who rejects Sav-A-Life counseling cannot be said to freely choose parental involvement. This is especially true when a minor seeks a judicial waiver after her parents refuse to consent, for in that instance a minor is not choosing between involving her parents and receiving pro-life counseling. Rather, she is choosing between continuing an unwanted pregnancy and receiving pro-life counseling. That choice is surely untenable.<sup>244</sup>

While the coercive aspect of mandated pro-life counseling proves uncomplicated, this alone does not settle the outcome of the coercion test. It must also be shown, of course, that the coerced behavior constitutes participation in a religious activity.<sup>245</sup> Unlike the Supreme Court's recent applications of the coercion test which have come in the context of obvious religious exercises, namely public recitations of prayer,<sup>246</sup> here we must determine whether Sav-A-Life counseling amounts to a religious exercise.

Toward this end, consider that all the Sav-A-Life affiliates we visited aim to share the gospel.<sup>247</sup> While sharing the gospel might not in every instance be precisely the same thing as leading someone in a

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<sup>242</sup> *Id.* at 595.

<sup>243</sup> *Id.*

<sup>244</sup> According to the Court in *Lee*, "[t]he degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590.

<sup>245</sup> This owes, of course, to the explicit proscription of the coercion test, which forbids a government practice that compels "anyone to support or participate in religion or its exercise." *Id.* at 587. What counts as religion or its exercise remains unsettled, but the Court has classified religion as encompassing beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." *United States v. Seeger*, 380 U.S. 163, 176 (1965). The question as to whether an activity is a religion for constitutional purposes is fact-intensive. *Id.*

<sup>246</sup> As *Lee* demonstrates, prayer constitutes religious activity. 505 U.S. at 586-87; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("[T]he delivery of a pregame prayer [at a high school football game] has the improper effect of coercing those present to participate in an act of religious worship.").

<sup>247</sup> See *supra* Part II.C.



prayer, when a counselor asks a young woman “about her relationship with Christ,”<sup>248</sup> or says that the “only help is a relationship with Jesus Christ,”<sup>249</sup> she engages in a religious activity. Providing counseling based on “evangelism explosion,”<sup>250</sup>—for example, asking a young woman, “If you die tonight, will [you] go to heaven?”<sup>251</sup>—is likewise a type of religious exercise. Showing women the Bible or certain religious tracts, as counselors at Sav-A-Life do,<sup>252</sup> is comparable to leading someone in a prayer. However the gospel is shared, whether through direct prayer, reading of Bible verses, or comments about the benefits of committing one’s life to Christ, the evidence demonstrates that Sav-A-Life counseling is rightly characterized as a religious activity.<sup>253</sup> And, worth emphasizing, such counseling takes place in a setting that bears the symbolic marks of religion.

It does not help matters that judges who require a pregnant minor to receive counseling from Sav-A-Life do so in advance of determining whether that minor is sufficiently mature to proceed with an abortion absent parental consent. In so doing, the judicial policy of mandating counseling runs the following risk: a minor who is later deemed immature will have been required to receive religious counseling. While government may not coerce anyone—whether mature or immature, adult or child—to support or participate in religion or its exercise, the Court has expressed particular apprehension when such coercion affects those of an impressionable age.<sup>254</sup>

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<sup>248</sup> Interview with Director of Sav-A-Life Affiliate 3, *supra* note 155.

<sup>249</sup> Interview with Director of Sav-A-Life Affiliate 2, *supra* note 128.

<sup>250</sup> Interview with Director of Sav-A-Life Affiliate 5, *supra* note 161.

<sup>251</sup> *Id.*

<sup>252</sup> Interview with Director of Sav-A-Life Affiliate 4, *supra* note 158.

<sup>253</sup> The evidence also suggests, as we have explained above, that Sav-A-Life is rightly characterized as pervasively sectarian, and we could arguably rely on this finding to settle the issue of whether mandated Sav-A-Life counseling fails the coercion test. As *Bowen* and other cases explain—albeit not in the context of analyzing the coercion test—pervasively sectarian institutions cannot separate the secular from the sectarian. *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988). If such is the context in which religious organizations provide counseling, then we must assume that the facially neutral activity of offering, for example, adoption counseling does become a religious activity by virtue of being carried out by a pervasively sectarian organization. In short, since Sav-A-Life is pervasively sectarian, its education and counseling services constitute religious activity.

<sup>254</sup> The Court’s comments about the relationship between religious coercion and impressionability typically have come in the context of cases involving children in elementary and secondary public schools. For example, in *Edwards v. Aguillard*, the Court overturned a Louisiana statute that mandated treatment of both creationism and evolution in the state’s public schools, saying:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

The claim that the religiously based counseling occurs in the private realm does not save from constitutional infirmity a policy that conditions the waiver process on Sav-A-Life counseling. Although the counseling takes place in the offices of a private organization and is offered by people who are not state employees, the fact that a judicial policy compels the counseling places the state's imprint on the activity.<sup>255</sup> Thus, when judges stipulate that minors obtain counseling from Sav-A-Life, they effectively force young women to participate in a religious activity and, in so doing, violate Establishment Clause strictures against coercion.

### C. The Endorsement Test

As discussed above, the endorsement test derives from Justice O'Connor's concurrence in *Lynch v. Donnelly*.<sup>256</sup> Under this test, "[d]irect government action endorsing religion or a particular religious practice is invalid . . . ."<sup>257</sup> Expounding upon the utility of the endorsement test in her concurrence in *Wallace v. Jaffree*, Justice O'Connor says:

In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.<sup>258</sup>

Justice O'Connor further explains that the endorsement test does not preclude government from acknowledging or taking account of religion.<sup>259</sup> However,

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Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987); see also *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

<sup>255</sup> The Court in *Lee* noted the importance of the state's "imprint" on the graduation prayer, saying: "The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Lee*, 505 U.S. at 590; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (following *Lee* in concluding that the degree of school involvement in the delivery of pregame high school football prayers bears the state's imprint).

<sup>256</sup> 465 U.S. 668, 687-88 (O'Connor, J., concurring); see *supra* text accompanying note 54.

<sup>257</sup> *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

<sup>258</sup> *Id.* at 69-70.

<sup>259</sup> *Id.* at 70.

[i]t does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[when] the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."<sup>260</sup>

Since adopting the endorsement test,<sup>261</sup> the Supreme Court has typically applied it in the examination of the constitutionality of public religious displays.<sup>262</sup> To the extent that mandated pro-life counseling might endorse religion, it would be an endorsement that is not on public display. This fact notwithstanding, a judge who requires counseling offered by an evangelical Christian mission sends "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>263</sup> Though not a public communication, the message is arguably stronger because it comes in the context of a coercive practice. As Justice Blackmun explains in his concurrence in *Lee*: "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."<sup>264</sup> Thus, enforced participation in pro-life counseling violates the Establishment Clause "in that 'an audience gathered by state power is lent . . . to a religious cause.'"<sup>265</sup>

#### IV. ALCOHOLICS ANONYMOUS AND NARCOTICS ANONYMOUS CASE LAW: COUNTERARGUMENT OR CORROBORATION?

To our knowledge, courts have yet to consider whether conditioning consent waivers on a minor's receipt of faith-based, pro-life counseling violates the Establishment Clause.<sup>266</sup> However, various state

<sup>260</sup> *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

<sup>261</sup> See *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 573 (1989) (explaining that the principles of the endorsement test have been adopted by the Court); *supra* Part I.B.

<sup>262</sup> See *supra* notes 55–66 and accompanying text.

<sup>263</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

<sup>264</sup> *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).

<sup>265</sup> *Griffin v. Coughlin*, 673 N.E.2d 98, 106 (N.Y. 1996) (citation omitted) (addressing compelled attendance of prisoners at Alcoholics Anonymous meetings).

<sup>266</sup> The Court of Civil Appeals of Alabama did rebuke a trial court judge for concluding that failure to seek counseling from a pro-life advocate shows a minor's immaturity. *In re Anonymous*, 733 So. 2d 429 (Ala. Civ. App. 1999). According to that holding:

Although our supreme court has stated that a minor who *does* seek the advice of a pro-choice advocate thereby demonstrates *maturity*, it has never stated the converse—that a minor who *does not* seek the advice of a group opposed to abortion thereby demonstrates

and federal courts have evaluated the constitutionality of similar practices in a relevantly similar context.<sup>267</sup> Law enforcement personnel and courts often condition such things as parole, probation, good time credits, in-prison recreational rights, and family visitation privileges on alcohol or drug offenders' attendance at, participation in, and/or successful completion of, programs based on Alcoholics Anonymous ("AA")<sup>268</sup> or its sister program, Narcotics Anonymous ("NA").<sup>269</sup> In light of the spiritual tenets of AA and NA, the fact that these organizations were modeled after the doctrines of a religious organization,<sup>270</sup> the role of God in the Twelve Steps and Twelve Traditions (the foundation principles of AA and NA),<sup>271</sup> and the use of prayer at meetings,<sup>272</sup> several Establishment Clause challenges have been brought against state-sponsored participation in these programs.<sup>273</sup>

A number of federal courts have rejected the claim that use of AA or NA as part of parole, probation, or prisoner rehabilitation breaches the Establishment Clause.<sup>274</sup> Because of the similarities be-

*immaturity.* To draw such a conclusion from the statements of the supreme court . . . would be illogical.

*Id.* at 431 (citations omitted). Despite this holding, this particular trial court judge continues to mandate pro-life counseling. Telephone Interview with Ala. Juvenile Court Judge, *supra* note 122.

<sup>267</sup> The United States Supreme Court has yet to consider such cases.

<sup>268</sup> AA "is the leading self-help, rehabilitative organization for alcoholics." Calabro, *supra* note 34, at 594.

<sup>269</sup> NA, a rehabilitative self-help organization for drug addicts, is modeled on AA. *See id.* at 590-91 ("Narcotics Anonymous, like A.A., follows a twelve-step program.").

<sup>270</sup> AA's founders, Bill Wilson and Robert Smith, were strongly influenced by the teachings of the Oxford Group, an evangelical Christian religious organization. *See* Apanovitch, *supra* note 56, at 790 (noting the Oxford Group's emphasis on aggressive evangelism and its effect on the framers of AA); Calabro, *supra* note 34, at 594 (noting the influence of the Oxford Group's teachings on the framers).

<sup>271</sup> AA bases its treatment on twelve intervals called the "Twelve Steps" and governs its organization on twelve rules called the "Twelve Traditions." Among the Twelve Steps are the following: (1) "Came to believe that a Power greater than ourselves could restore us to sanity;" (2) "Made a decision to turn our will and our lives over to the care of God *as we understood Him*;" (3) "Admitted to God, to ourselves, and to another human being the exact nature of our wrongs;" (4) "Were entirely ready to have God remove all these defects of character;" (5) "Humbly asked Him to remove our shortcomings;" and (6) "Sought through prayer and meditation to improve our conscious contact with God *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out." Apanovitch, *supra* note 56, at 791. The Twelve Traditions state in part that "[f]or our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern." Calabro, *supra* note 34, at 595 n.247.

<sup>272</sup> *See* Apanovitch, *supra* note 56, at 791 (noting that members at AA meetings frequently engage in group prayer).

<sup>273</sup> *See* Calabro, *supra* note 34, at 596-602 (describing the nature of Establishment Clause claims arising under these programs).

<sup>274</sup> *See, e.g.,* O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994) (holding that the state does not violate the Establishment Clause by requiring convicted drunk drivers to participate in

tween AA and NA cases and the instant issue, the rulings of these courts might be thought to undercut our contention that mandated Sav-A-Life counseling intrudes on First Amendment guarantees.

### A. *Decisions Supporting Mandated Substance Abuse Treatment*

Consider, for example, *Stafford v. Harrison*.<sup>275</sup> There, a federal district court rejected a prison inmate's claim that the Kansas Parole Board violated the Establishment Clause by conditioning his parole on continued treatment in AA.<sup>276</sup> According to the ruling, "[w]hile the spiritual nature of Alcoholics Anonymous cannot be denied, the court is not persuaded this program may properly be characterized as a religion."<sup>277</sup> Relying on an analysis of the central text of the program, *Alcoholics Anonymous*, the court stressed that the program did not define any single image or exclusive concept of the referenced "Higher Power."<sup>278</sup> Furthermore, the court explained that the meaning of "Higher Power" was left to the individual participant's definition,<sup>279</sup> "the program itself does not consider its system a religion,"<sup>280</sup> and the belief in a "Supreme Being" is not "a distinguishing characteristic of religion."<sup>281</sup> While acknowledging that the philosophy of AA includes references to a Higher Power, the court argued that it could not "on that basis alone reasonably conclude either that Alcoholics Anonymous constitutes a religion or that a religion was impermissibly thrust upon plaintiff during his incarceration."<sup>282</sup>

Similarly, in *Jones v. Smid*,<sup>283</sup> a federal district court reviewed a prison inmate's challenge to his mandated participation in an AA treatment program.<sup>284</sup> The inmate asserted that as part of his treat-

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AA despite its religious overtones); *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993) (holding that mandated participation in the Operating While Intoxicated ("OWI") treatment program did not violate the Establishment Clause); *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Kan. 1991) (holding that the Establishment Clause was not violated when a prison forced an inmate to participate in a rehabilitation program similar to AA).

<sup>275</sup> 766 F. Supp. 1014.

<sup>276</sup> *Id.* at 1017-18. Serving a two to seven-year sentence for aggravated assault, Stafford had entered an inpatient treatment program based on AA and NA principles. Due to his poor progress, he was removed from the treatment program without a certificate of satisfactory completion and, as a result, the Kansas Parole Board passed him for consideration for ten months, again recommending his participation in an alcohol and drug treatment program. *Id.* at 1015-16.

<sup>277</sup> *Id.* at 1016.

<sup>278</sup> *Id.* at 1016-17.

<sup>279</sup> *Id.* at 1017.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> No. 4-89-CV-20857, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993).

<sup>284</sup> Jones had pleaded guilty to a third offense of driving under the influence of alcohol or a drug. His five-year prison sentence was suspended and Jones was granted probation condi-

ment he had been compelled to recite a promise from the *Alcoholics Anonymous* book that included the statement "[w]e will suddenly realize that God is doing for us what we could not do for ourselves."<sup>285</sup> The court concluded, however, that the plaintiff had been given alternatives to saying "God" and that "[h]e knew he could have written an explanation of what the promise meant to him and how it applied in his life."<sup>286</sup> In the court's view, since Jones, an adult, had alternatives to reciting the word "God" in the AA promise, "[a] 'reasonable dissenter in this milieu' would not believe the promise, delivered with an alternative phrase, signified his own participation in, or approval of, a religious practice."<sup>287</sup> In addition, the court acknowledged the spiritual character of AA but adopted *Stafford's* reasoning that the program did not amount to religion and left to the individual the prerogative of defining the meaning of "higher power."<sup>288</sup> The court thus concluded, using *Lemon*, that the state had not improperly established a religiously based program.<sup>289</sup>

A federal district court again upheld state-sponsored use of AA in *O'Connor v. California*.<sup>290</sup> O'Connor, after his conviction for drunk driving, faced probationary terms that included alcohol education and, in particular, participation in weekly self-help meetings run by a state-approved program.<sup>291</sup> AA was among such approved programs, but O'Connor had the option of attending the less accessible Rational Recovery, a secular non-twelve-step alternative.<sup>292</sup> Applying *Lemon* as modified by endorsement principles, the court found that the primary purpose and effect of mandated participation in self-help meetings was not to advance religious belief, but to prevent drunk driving and treat substance abuse.<sup>293</sup> The court also stated that "the fact that the concept of God is incorporated in a program in which the State encourages participation does not in itself violate the Establishment Clause."<sup>294</sup> Noting the spiritual and, indeed, monotheistic

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tioned upon completion of a substance abuse treatment program offered by the Fort Des Moines Correctional Facility. *Id.* at \*1.

<sup>285</sup> *Id.* at \*1-2.

<sup>286</sup> *Id.* at \*2.

<sup>287</sup> *Id.* at \*5 (quoting *Lee v. Weisman*, 505 U.S. 577, 593 (1992)).

<sup>288</sup> *Id.* at \*4.

<sup>289</sup> Although the court cited *Lee* throughout its opinion, it decided under *Lemon*, rather than under *Lee*, that the program was constitutional. According to the ruling, "[t]he court holds the OWI program satisfies the *Lemon* test applied in Establishment Clause cases: The program reflected a clearly secular purpose, had a primary effect that neither advanced nor inhibited religion, and avoided excessive government entanglement with religion." *Id.* at \*5.

<sup>290</sup> 855 F. Supp. 303 (C.D. Cal. 1994).

<sup>291</sup> *Id.* at 304.

<sup>292</sup> *Id.* at 305.

<sup>293</sup> *Id.* at 307.

<sup>294</sup> *Id.* at 308.

foundations of AA,<sup>295</sup> the court held that a plaintiff would have to show more than the incorporation of God into the program to establish a constitutional violation.<sup>296</sup> The court concluded that the plaintiff did not show state endorsement of AA's religious message (rather than promotion of the concept of self-help), since individuals could choose what program to attend and since they even had the option of creating for county approval their own program of "self-help."<sup>297</sup> Because the only connection between the state and AA was that individuals were required to participate in self-help meetings, and because AA was only a recommended resource for such meetings, the plaintiff failed to show the sort of entanglement that violates the Constitution.<sup>298</sup>

### *B. Decisions Invalidating Mandated Substance Abuse Treatment*

The judicial practice of sending minors to Sav-A-Life might appear to find some constitutional support in the above-cited rulings.<sup>299</sup> However, other rulings push in the opposite direction.

In *Griffin v. Coughlin*,<sup>300</sup> the Court of Appeals of New York ruled in favor of an inmate's claim that prison officials violated Establishment Clause strictures by conditioning his participation in a family visitation program on an AA-based treatment program.<sup>301</sup> The court found that

the A.A. basic doctrinal writings clearly express a preference for and a conviction favoring a concept of God and prayer which is not merely "a conscientious social belief, or a sincere devotion to a high moralistic philosophy [but] one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one."<sup>302</sup>

<sup>295</sup> *Id.* at 307.

<sup>296</sup> *Id.* at 308.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* The court also pointed out, in arriving at its conclusion regarding entanglement, that "AA does not receive any money, materials, or administrative input from religious groups or institutions, nor does it receive any money from the State or County in exchange for accepting those convicted of drunk driving." *Id.*

<sup>299</sup> See discussion *supra* Part IV.A; see also *Boyd v. Coughlin*, 914 F. Supp. 828, 833 (N.D.N.Y. 1996) (rejecting an Establishment Clause claim based on a prison inmate's removal from a family visitation program for his failure to participate in the facility's substance abuse program, which required attendance at AA or NA meetings).

<sup>300</sup> 673 N.E.2d 98 (N.Y. 1996).

<sup>301</sup> In so doing, the court reversed the Appellate Division's judgment, which had found no Establishment Clause violation. According to the court, the Appellate Division had erred in (1) "applying too narrow a concept of religion or religious activity for Establishment Clause analysis," and (2) "disregarding the compulsion used to induce petitioner to attend and participate in A.A. meetings heavily laced with at least general religious content." *Id.* at 101.

<sup>302</sup> *Id.* at 103 (citation omitted). In arriving at this finding, the court also considered, among other things, that "[f]ollowers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe," and "[i]n 'working' the 12 steps, partici-

Based on this finding, the court declared that AA's "expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes,"<sup>303</sup> and, in turn, that the prison's use of AA in an exclusive and compulsory treatment program violated the Establishment Clause.<sup>304</sup> Looking to *Everson* and *Lee*, and relying on the coercion test,<sup>305</sup> the court explained that "enforced attendance at A.A. meetings as part of the [Treatment] Program violates the Establishment Clause in that 'an audience gathered by state power is lent . . . to a religious cause.'"<sup>306</sup> In that way, the prison had "apparently employed the machinery of the state to gather an [involuntary] audience for religion."<sup>307</sup>

In contrast to other courts' AA decisions, the *Griffin* court was not swayed by the argument that, because AA's doctrines and practices are amenable to secular interpretation, the mandated program survives Establishment Clause scrutiny. Given that AA's "paramount theme . . . favors a religious interpretation," the court found that the program violated the "wholesome neutrality" requirement of the Establishment Clause:<sup>308</sup>

The State, through its [Treatment] Program, delegates to A.A. volunteers a crucial part of the State's discretionary authority to conduct mandatory treatment programs for alcohol and drug addicted inmates in the State's prison system. Inmates are pressured to participate in the program by the State's conditioning eligibility for the Family Reunion Program on attendance. Yet correctional authorities have not incorporated into the [Treatment] Program any effective means to insure that A.A. meetings for inmates are free of religious content and that rehabilitation and treatment are performed by purely secular means . . . .<sup>309</sup>

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pants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings." *Id.* The court could not conceive of how one could "perform a confessional of 'wrongs' (Step 5) or seek, through 'prayer,' 'contact' (Step 11) with a God devoid of religious content." *Id.* at 106.

<sup>303</sup> *Id.* at 103.

<sup>304</sup> *Id.* at 105.

<sup>305</sup> According to the *Griffin* ruling, "[t]here is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to force one to profess a religious belief or participate in a religious activity." *Id.* The court rejected the dissent's criticism that the majority had "wrongfully interjected a 'dominant' coercion element in a 'novel' or 'tenuous' manner unsupported by precedent, to Establishment Clause jurisprudence." *Id.* at 106 n.6 (citations omitted). According to the majority, the opinions of all nine of the Justices in *Lee* dealt with "anticoercion as a settled precept of the Establishment Clause either independently or as a prohibited governmental endorsement of religion in violation of the second prong of the three-part Establishment Clause test of *Lemon v. Kurtzman*." *Id.*

<sup>306</sup> *Id.* at 106 (citation omitted).

<sup>307</sup> *Id.* (alteration in original).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 107



Noting the coercive aspects of the penal program, the court also found that the program failed the second prong of *Lemon*.<sup>310</sup> Applying the endorsement formulation of the second *Lemon* prong, the court concluded:

It is simply unimaginable that inmates in the inherently authoritarian atmosphere of a prison would not perceive that such a mandatory, exclusive program, facially containing expressions and practices that "ha[ve] always been religious," favors inmates who adhere to those beliefs, and symbolically condones the religious proselytizing those expressions literally reflect.<sup>311</sup>

Like the *Griffin* court, the Seventh Circuit Court of Appeals in *Kerr v. Farrey*<sup>312</sup> applied the coercion test to a prison rehabilitation program that required inmates with chemical abuse problems to participate in NA. Inmates who failed to attend NA meetings were subject to "a higher security risk classification and negative effects on parole eligibility."<sup>313</sup> According to the Seventh Circuit, the relevant inquiry "when a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion" is: "first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?"<sup>314</sup> Applying these factors to the plaintiff's case,<sup>315</sup> the court found that the first two criteria were easily met.<sup>316</sup> Considering the third factor, the court rejected the contention that because NA used phrases like "God, as we understood Him," and because the concept of God could include the non-religious idea of willpower within the individual, the program was spiritual rather than religious.<sup>317</sup> To the contrary, the court maintained, "[a] straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being."<sup>318</sup> Given the religious grounding of NA and the fact that requisite meetings were "permeated with explicit religious con-

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<sup>310</sup> The court raised this issue in asserting that the lower court had erred in its analysis. *Id.* Rebutting the lower court finding, the court explained that it is not the case that "the religious consequences of the State action must predominate over any secular objective or consequence. No measurement or weighing of the respective secular and religious effects is required." *Id.* at 108. Rather, an Establishment Clause violation results if the "'inevitable effect [of the State action is] to aid and advance' religion." *Id.* (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973)).

<sup>311</sup> *Id.* (citation omitted).

<sup>312</sup> 95 F.3d 472 (7th Cir. 1996).

<sup>313</sup> *Id.* at 474.

<sup>314</sup> *Id.* at 479.

<sup>315</sup> Kerr was an inmate at a minimum security prison in Wisconsin who claimed to have been told by his prison social worker that attendance at NA meetings was mandatory and failed attendance might result in his transfer to a medium security facility. *Id.* at 474.

<sup>316</sup> *Id.* at 479.

<sup>317</sup> *Id.* at 479-80.

<sup>318</sup> *Id.* at 480.

tent,"<sup>319</sup> the court concluded that the program intruded upon "the prohibition against the state in favoring religion in general over non-religion."<sup>320</sup>

Several other decisions echo the holdings in *Griffin* and *Kerr*. For example, the Second Circuit Court of Appeals has ruled that requiring AA treatment as a condition of probation—where attendees were told to pray to God, where meetings opened and closed with group prayer, and where participants were not offered any choice among therapy programs—amounts to "coerced participation in a religious exercise."<sup>321</sup> Similarly, a federal district court in New York has held that because participation in AA and NA constitutes religious exercise, "[i]t is an inescapable conclusion that coerced attendance at such programs therefore violates the Establishment Clause."<sup>322</sup> And, according to a federal district court in Wisconsin, mandating a residential substance abuse treatment program based on AA and NA as an alternative to revoking parole violates Establishment Clause strictures against coercion.<sup>323</sup> In arriving at this conclusion, the district court rejected the argument that the plaintiff "needed only to request a secular alternative."<sup>324</sup> The government must always, and not just upon request, obey the Constitution, the court explained.<sup>325</sup> Furthermore, in the face of the plaintiff's weak bargaining position relative to that of the judge and parole officer, "[h]e was in no position

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1076 n.8 (2d Cir. 1997). The court rejected the notion that the non-sectarian nature of the AA experience immunized its use of religious symbolism and practices from Establishment Clause scrutiny. The court noted that the Supreme Court has repeatedly emphasized that non-sectarian religious exercise does not fall outside of First Amendment scrutiny—"a principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion." *Id.* at 1076 (alteration in original).

<sup>322</sup> *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998). Although the court advanced *Lemon* as the controlling analysis, *id.* at 315–16, the court's conclusion appeared to turn, at least in part, on the presence of coercive aspects of the action.

<sup>323</sup> *Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1034 (E.D. Wis. 2001). Bausch had been offered the choice between returning to prison and entering a residential substance abuse treatment program after having violated the conditions of his parole. *Id.* at 1031. According to the *Bausch* ruling:

Because [the treatment facility] was presented to plaintiff as the only available and feasible alternative to revocation, he faced the "force of law" and the "threat of penalty" even more dramatically than the plaintiff in *Kerr*; participating in the [treatment] program was effectively presented to him as a condition of remaining on parole, and so far as he knew, the penalty for declining was being returned to prison.

*Id.* at 1034.

<sup>324</sup> *Id.* at 1035.

<sup>325</sup> *Id.* The court further reasoned that constitutional protections do not exist only for those resourceful or brave enough to object, but also apply to those "who feel they have little choice but to comply." *Id.*

to request concessions or to propose alternatives.”<sup>326</sup> The court concluded that, in light of this inherently coercive atmosphere, “the need for full disclosure of an offender’s constitutional alternatives is even stronger here than in the *Miranda* context.”<sup>327</sup>

*C. Comparing Mandated Substance Abuse Treatment  
with Mandated Sav-A-Life Counseling*

The rulings that have invalidated mandatory participation in AA or NA obviously lend strong support to our conclusion that required counseling from Sav-A-Life infringes on First Amendment protections. Furthermore, and contrary to what one might think, the rulings that have permitted the use of AA or NA do not provide grounds for concluding that our analysis of Sav-A-Life counseling is misguided. Indeed, despite their divergent holdings, the rulings that consider state-sponsored use of AA or NA do not deviate on the following key point: If AA or NA programs amount to religious exercise, state efforts to coerce participation in these programs run afoul of the Establishment Clause.

The consensus surrounding this point is clear in the line of decisions that have overturned mandatory AA or NA treatment. In these cases, the courts expressly ruled that AA and NA meetings constitute religious exercise and, when parole, probation, or prison benefits are conditioned upon participation in these meetings, the coercive effect is plain. In the decisions upholding reliance on AA or NA, the courts did not explicitly make this point, but neither did they oppose it. Instead, those decisions turn either on a finding that AA or NA is not religion or that coercion is absent. Nothing in any of the above-cited cases suggests that the court in question would allow government to coerce anyone into engaging in a religious exercise.

Still, the following questions remain. First, in light of the guidance offered by the AA and NA rulings, is it appropriate to characterize the counseling offered by Sav-A-Life as a religious exercise? Second, and again in light of the AA and NA decisions, have we rightly characterized the counseling requirement as coercive?

The AA and NA rulings offer differing assessments of the religious nature of these treatment programs. The courts in *Stafford v. Harrison*<sup>328</sup> and *Jones v. Smid*<sup>329</sup> were not persuaded that the spiritual charac-

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<sup>326</sup> *Id.* at 1036.

<sup>327</sup> *Id.* “[J]ust as the inherently coercive atmosphere of custodial interrogation may be dispelled only by informing the suspect of his right to counsel, so the only way to dispel the inherently coercive atmosphere present here was to advise plaintiff of his right to a meaningful secular alternative.” *Id.* (citation omitted).

<sup>328</sup> 766 F. Supp. 1014 (D. Kan. 1991).

<sup>329</sup> No. 4-89-CV-20857, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993).

ter of AA supported the conclusion that the program amounts to religion. By contrast, the court in *Griffin v. Coughlin* found that AA tenets and practices necessarily entail religious exercise,<sup>330</sup> and the *Kerr v. Farrey* court concluded that NA meetings were "permeated with explicit religious content."<sup>331</sup>

Comparing these assessments to the instant case, there can be little question that the tenets of Sav-A-Life are fundamentally religious and that, because counselors seek, as their main mission, to communicate a religious message, religious content permeates Sav-A-Life counseling. Thus, if we rely only on the guidance of *Griffin* and *Kerr*, we conclude that Sav-A-Life counseling sessions are religious exercise. But even if we adopt the guidance of *Stafford* and *Jones*, the same conclusion emerges. While it might be arguable that AA and NA are spiritually, rather than religiously, oriented, the same cannot be said of Sav-A-Life. Unlike the AA Big Book and the Twelve Steps, which make reference to "God," a greater "Power," and the spiritual,<sup>332</sup> Sav-A-Life tenets refer to Jesus Christ and the specific beliefs surrounding the death, resurrection, and second coming of Christ.<sup>333</sup> Also distinguishable from *Stafford* and *Jones*, counseling sessions offered by Sav-A-Life aim to share a particular religious message through the gospel of Christ. Therefore, while one might make a plausible argument that AA and NA programs are amenable to secular interpretation, denying the religiosity of Sav-A-Life—a ministry that places a premium on proselytizing—at a minimum lacks credibility and, indeed, ventures on the absurd.

Turning to the question of coercion, the judicial finding that AA or NA programs entail religious exercise has not, by itself, determined the outcome of the cases upholding mandated participation in AA or NA. Instead, upon finding that these programs have religious content, courts have turned their attention to an assessment of the coercive character of the participatory directives. In so doing, these courts have focused especially on two matters: (1) the benefits and costs tied to participation or non-participation in the treatment program, and (2) whether the state provided a secular treatment alternative.

It is clear that significant benefits and costs attend the disposition of a minor's decision whether to capitulate to mandated Sav-A-Life counseling, just as costs and benefits attend decisions whether to participate in AA and NA. However, when states have provided alterna-

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<sup>330</sup> 673 N.E.2d 98 (N.Y. 1996).

<sup>331</sup> 95 F.3d 472 (7th Cir. 1996).

<sup>332</sup> See *Griffin*, 673 N.E.2d at 100 n.1 (listing the Twelve Steps and the aforementioned references).

<sup>333</sup> See, e.g., GUIDING PRINCIPLES, *supra* note 173; STATEMENT OF FAITH, *supra* note 170.

tive secular programs as part of their treatment mandates, courts have upheld the use of AA and NA. And even some courts that have rejected mandated participation in AA or NA have indicated that such treatment mandates could withstand constitutional scrutiny if they gave participants the option of bypassing the program's religious components or if secular alternatives were offered.<sup>334</sup> Thus, while courts have split over whether the conditioning of benefits and sanctions on participation in AA or NA constitutes coercion, this division stems not from conflicting reasoning about the nature of coercion but from factual findings concerning the provision of secular treatment alternatives.

These holdings suggest that we must consider whether judges who mandate pro-life counseling present minors with secular alternatives to Sav-A-Life. Our evidence suggests, to the contrary, that Alabama courts requiring minors to receive pro-life counseling specify Sav-A-Life. While we have not spoken with all the judges who routinely issue this mandate, those with whom we have spoken explicitly mention Sav-A-Life. Moreover, attorneys who represent minors before these judges, as well as some directors of Sav-A-Life affiliates, corroborate the finding that judges require counseling from Sav-A-Life in particular.<sup>335</sup>

Still, a judge who imposes this requirement might counter that counseling from *any* CPC would suffice, and that the referral to Sav-A-Life owes only to the widespread availability of affiliate offices. For the sake of the argument, we will assume this is true and consider whether such a scenario would sustain the conclusion that minors have been given a secular alternative to Sav-A-Life counseling.

To proceed with this consideration, let us examine those CPCs that are not associated with the thirty-three Sav-A-Life offices in Alabama. We found ten such CPCs,<sup>336</sup> each of which serves a religious, though not necessarily evangelical, mission.<sup>337</sup>

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<sup>334</sup> See, e.g., *Alexander v. Schenk*, 118 F. Supp. 2d 298, 302 (N.D.N.Y. 2000) (finding that while coerced participation in a correctional facility's AA-based treatment program violates the Establishment Clause, the program would likely survive constitutional scrutiny if prisoners were permitted to opt out of religious portions of the program).

<sup>335</sup> See *supra* Part II.B.

<sup>336</sup> Unlike Sav-A-Life, which has a central website listing all of its affiliate offices, there is no such website that catalogs all CPCs in Alabama. To locate the non-Sav-A-Life CPCs we performed a web-based search of Yahoo's yellow pages for "abortion alternatives," "crisis pregnancy," and "pregnancy counseling" in and beyond the following cities in Alabama: Tuscaloosa, Huntsville, Montgomery, Birmingham, Mobile, and Dothan. To the extent that crisis pregnancy centers are listed in Yahoo's yellow pages, this search covers virtually all of Alabama. In addition, we cross-checked these findings against the websites of the major CPC umbrella organizations, including Care Net (<http://www.care-net.org>), Birthright International (<http://www.birtheright.org>), Heartbeat International (<http://www.heartbeatinternational.org>), America's Crisis Pregnancy Helpline (<http://www.thehelpline.org>), and Bethany Christian Services

While evangelism is not the goal of all the non-Sav-A-Life CPCs in Alabama, it does provide the mission of some. For example, the Real Life Crisis Pregnancy Center, with two locations in Alabama, explains, "On behalf of countless unborn children . . . we have presented each person that has come to us with the message of hope that is present in the life-changing gospel of Jesus Christ."<sup>338</sup> The Autauga Crisis Pregnancy Center, a self-described "Christian Pro-Life Ministry," holds an affiliation with Care Net, an umbrella organization that boasts a network of 750 pregnancy resource centers across the United States and Canada.<sup>339</sup> While Care Net's Web site says little about the organization's religious foundations, the affiliate application form indicates the religious grounding of the organization and its members. Care Net's stated mission "is to promote and assist the evangelistic, pro-life work of pregnancy centers in North America."<sup>340</sup> Membership in Care Net requires adherence to the organization's "Standards of Affiliation," the first of which states that the "primary mission of the center is to share the truth and love of Jesus Christ in conjunction with a ministry to those facing pregnancy related issues."<sup>341</sup> Membership also entails agreement with Care Net's "Statement of Principle," which explains that the "pregnancy center is an outreach ministry of Jesus Christ through His church. Therefore, the pregnancy center, embodied in its volunteers, is committed to presenting the gospel of our Lord to women with crisis pregnancies—both in word and in deed."<sup>342</sup>

All the other non-Sav-A-Life CPCs share affiliations with Catholic churches or other Catholic organizations, or, even if nondenominational, receive support from the Catholic Church. For example, 2B

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(<http://www.bethany.org>). Finally, we cross-checked our findings against the list of CPCs available at OptionLine (<http://www.pregnancycenters.org>) and Lifecall (<http://www.lifecall.org>). While we cannot be certain that we located every non-Sav-A-Life CPC in Alabama, we believe these searches identified most, if not all, of these organizations.

<sup>337</sup> In January 2002, our research assistant contacted these ten CPCs by phone to determine their religious affiliations and whether they define themselves as Christian ministries.

<sup>338</sup> Real Life Crisis Pregnancy Ctrs., Real Life Mission, at <http://www.reallifecpc.org/mission.html> (last visited Oct. 30, 2004).

<sup>339</sup> Care Net, at <http://www.care-net.org> (last visited Oct. 30, 2004).

<sup>340</sup> CARE NET, PREGNANCY CENTER AFFILIATION PACKAGE, *supra* note 221, at 4.

<sup>341</sup> *Id.* at 8–9.

<sup>342</sup> *Id.* at 8, 11. Care Net affiliates also adopt a "Statement of Faith" which expresses belief in the Bible, the trinity, and "the deity of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory." *Id.* at 10. With an annual affiliation fee, members receive, among other things, an "Evangelism Manual," *id.* at 2, that serves to teach affiliates how "to share Christ with [their] clients" and "[i]ncludes stories of actual evangelistic situations." Care Net, Online Resource Catalog, at <http://www.care-net.org/bookstore> (last visited Oct. 30, 2004).

Choices, a CPC in Mobile, is part of Daughters of Charity,<sup>343</sup> an organization of Catholic women who are "urged by the charity of Christ to reach out to those most in need."<sup>344</sup> Wiregrass Emergency Pregnancy and Her Choice Birmingham are affiliated with Catholic organizations.<sup>345</sup> COPE (Counseling Outreach for Pregnancy Emergency), with two locations in or near Montgomery, is a nondenominational CPC that was started by the Archdiocese of Mobile.<sup>346</sup>

While the CPCs associated with Catholic organizations do not adopt an evangelical approach, religion grounds their missions. As the director of one of these CPCs explained in distinguishing her organization from those CPCs that adopt an evangelical approach,

Our approach is ecumenical. Our spiritual dimension [is that] we're not here to convert women. . . . We'll talk about God and the sanctity of life, and why life is precious. . . . Under the Christian Ecumenical approach, God is the creator of life and he is the taker of life and that can be understood whether you're Catholic, Hindu, Muslim, or Jew.<sup>347</sup>

The director of another CPC, the office of which is located in a Catholic Church, illuminated how religion makes its way into counseling. "Ultimately, at the very end, if they haven't indicated that they're going to have the baby, we ask them to pray on it and think about it and to talk to us again."<sup>348</sup> When asked whether counselors seek to share the gospel with clients, this director answered, "It depends on the client, but normally we don't. We tell them God meant for this baby to be born. These are a blessing."<sup>349</sup>

Placing more emphasis on witnessing, a third CPC director nevertheless expressed the view that religious counseling should be balanced with attending to the particular and immediate needs of the client:

You're not going to push religion down their throats. I hope all of us here witness. But I had a client who was in tears because at another CPC she was told that what she's done is against God's will. We bring the spiritual into it, but right now she needs so much. . . . As she comes back, she might ask us to pray for her. I've had them come in and say, "I don't want to be saved," or "I am saved," but here they're doing the same thing

<sup>343</sup> See Daughters of Charity, Ministries & Contacts, at <http://www.doc.org/contact/alabama.asp> (last visited Oct. 30, 2004).

<sup>344</sup> Daughters of Charity, About Us, at <http://www.doc.org/about/index.asp> (last visited Oct. 30, 2004).

<sup>345</sup> Interview with Director of non-Sav-A-Life CPC 1, in Ala. (July 23, 2003); Phone Contact with non-Sav-A-Life CPC (Jan. 2002).

<sup>346</sup> Interview with Director of non-Sav-A-Life CPC 2, in Ala. (July 24, 2003). The organization continues to receive funding from the Archdiocese.

<sup>347</sup> Interview with Director of non-Sav-A-Life CPC 1, *supra* note 345.

<sup>348</sup> Interview with Director of non-Sav-A-Life CPC 3, in Ala. (July 23, 2003).

<sup>349</sup> *Id.*

over and over. I've seen so many women. All I can do is think of their needs at the time. So I don't start right away with accept Christ in your life. We start off focusing on women and their needs, and then religion comes in. I had a woman once who was pregnant, was living in a car; her husband wants her to have an abortion, and she is so torn up about what to do. She didn't know whether to have an abortion; she felt it was wrong, but her husband wanted her to have it. Finally, I said, "Do you have a prayer book?" I said, "It's God who is going to get you through it." Since then, she said she prayed everyday.<sup>350</sup>

Whether evangelical or not, the non-Sav-A-Life CPCs in Alabama share a religious mission. And the three non-Sav-A-Life CPC offices that we visited, like those of Sav-A-Life, bear the marks of religion. Indeed, religious symbolism appears throughout the rooms of these CPCs and includes crosses, depictions of Jesus, biblical verses, and the like. Given what we learned from interviews as well as what we can glean from publicly available information, it would be hard to deny the fundamentally religious—as opposed to merely spiritual—character of these organizations.<sup>351</sup>

Even if it were true that some of these ten CPCs routinely provided secular pro-life counseling, those located in or near the counties where judges impose the counseling mandate are clearly religious.<sup>352</sup> Furthermore, no alternative CPCs are found in two counties where judges send minors to learn the pro-life perspective. Therefore, judges would be hard-pressed to make the claim that when minors seek pro-life counseling they have a reasonable choice between secular and sectarian alternatives.

In sum, several judges in Alabama mandate Sav-A-Life counseling as a condition for waiver grants. Applying the guidance of the AA and NA case law, we find that the patently religious nature of Sav-A-Life counseling and the coercive nature of the counseling mandate add up to a clear violation of the Establishment Clause. Were judges to relax their mandate and allow counseling from any Alabama CPC, it is unlikely such a move would save the mandate from constitutional infirmity, given the religious character of the non-Sav-A-Life CPCs. It is unlikely that these CPCs provide the secular alternative to Sav-A-Life required by the AA and NA case law.

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<sup>350</sup> Interview with Director of non-Sav-A-Life CPC 2, *supra* note 346. This director further explained her goal in talking with clients: "I'm trying to get girls to see that the baby is a gift from God, not a tumor." *Id.*

<sup>351</sup> Because the non-Sav-A-Life CPCs are, for the most part, independent of one another, and because we visited only three, our inferences about the nature of their organizations and, specifically, about their counseling practices are not easily generalized. Still, our conclusion that these organizations are religious, as opposed to merely spiritual, is well-grounded in the evidence.

<sup>352</sup> The non-Sav-A-Life CPCs we visited were chosen based on their proximity to the counties where judges mandate pro-life counseling.



## CONCLUSION

The Court has ruled that a public high school student compelled, against her religious beliefs, to listen to a two-minute, non-denominational invocation and benediction at her graduation suffers injury that is not *de minimis*.<sup>353</sup> If that injury is one of consequence, how might we describe the injury suffered by a minor subjected to unwanted counseling at Sav-A-Life? The graduating high school student listens silently to an invocation and benediction. That student stands as one among many. No one asks the student to respond to the prayer; and the student is not required to listen to the prayer for more than a short time. The prayer speaks not of Jesus or Vishnu or Allah, but, more generally, of "God" and "Lord."<sup>354</sup> The student "can concentrate on joining its message, meditate on her own religion, or let her mind wander."<sup>355</sup> By contrast, going to Sav-A-Life exposes a pregnant minor to more than just a short prayer. She faces counseling that lasts from thirty to sixty minutes.<sup>356</sup> While not all of that counseling directly addresses religious matters, religion undergirds the conversation. And, notably, it is a conversation. Unlike the silent graduating senior who remains free to let her mind wander, counselors expect the pregnant minor to respond to religious questions: questions directed to her and her alone; questions about a specific God, namely Jesus Christ; questions about her relationship with that God; questions about heaven, hell, and maybe even Satan; questions posed in a setting where a cross, an image of Jesus, Mary, or some other sectarian symbolism hangs on the wall. And, not to be overlooked, the two situations have an undeniable qualitative difference. While the high school student forced to listen to the recitation of a prayer may justifiably suffer offense and feel indignant and alienated, the minor seeking a parental consent waiver faces a life-changing decision, of which the religiously-based counseling has become an integral part.

One might think that given this considerable injury, a legal challenge to this policy would be forthcoming. Indeed, it is a commonly held belief that the protections afforded by the Constitution provide

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<sup>353</sup> Lee v. Weisman, 505 U.S. 577, 594 (1992).

<sup>354</sup> *Id.* at 581–82.

<sup>355</sup> *Id.* at 594.

<sup>356</sup> See, e.g., Interview with Director of Sav-A-Life Affiliate 4, *supra* note 158 ("Every girl watches a video. . . . The videos are 25 minutes. The whole counseling session is about an hour."). Compare *id.* ("We ask the girls with positive tests to be part of Life Choices. It's a program that includes 6 more visits while pregnant."), with Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1076 (2d Cir. 1997) ("In contrast to the plaintiff in *Lee*, who 'was subjected only to a brief two minutes of prayer on a single occasion,' Warner 'was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation.'").

the necessary shield against rights infringements and that, even when the shield becomes permeable, obvious rights infringements will not long endure. The allure of "the myth of rights"—that is, the view that "the political order in America actually functions in a manner consistent with the patterns of rights and obligations specified in the Constitution"<sup>357</sup>—leads us to trust in our rights and their implementation by judges and courts. So, one might think, it should not be too long before a challenge to this counseling mandate emerges and the policy is struck down by a court.

Moreover, in this particular case, minors have the benefit of appointed legal counsel. With legal counsel on her side, a minor could mount a legal challenge in an effort to "evoke a declaration of rights."<sup>358</sup> And if the Sav-A-Life mandate produces the magnitude of constitutional injury we have described, surely an attorney would help, and maybe even advise, the minor to undertake such an effort.

As reasonable as this might sound, the context in which this Establishment Clause violation occurs makes the prospect of a legal challenge to the judicial practice decidedly unlikely. Even in the best of circumstances, a minor who petitions for a waiver of parental consent does so with considerable apprehension. Such a minor confronts not only the stress of an unwanted pregnancy and the prospect of terminating that pregnancy, but also a hearing before an authoritative stranger whose decision may dramatically alter her life. "Generally they're so frightened to be in there," one attorney said of minors who appear before judges in waiver hearings.<sup>359</sup> To imagine that such a minor would add to the anxiety of the waiver process an Establishment Clause challenge when, as her alternative, she can seek counseling from Sav-A-Life, ignores the vulnerable position in which a minor finds herself. In particular, a minor who pursues such a challenge runs an increased risk that her parents will discover her situation. Add to this the time pressure of an advancing pregnancy and the additional stress associated with protracted legal proceedings and we should hardly be surprised that when presented with the options of going to Sav-A-Life and initiating a lawsuit, a minor would choose the former.

While an attorney representing a minor in this situation might well appreciate the constitutional violation produced by the counseling mandate, that attorney would nevertheless be hard-pressed to en-

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<sup>357</sup> STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 17 (1974).

<sup>358</sup> Those who believe in the myth of rights ideology accept the assumption that "[t]he principal institutional mechanism of the myth of rights is litigation, which we are encouraged to view as an effective means for obtaining declarations of rights from the courts, for assuring realization of those rights, and for building a more just social order." *Id.* at 14.

<sup>359</sup> Telephone Interview with Attorney representing minors in Ala. (May 16, 2001).

courage the young women to file a legal challenge. According to some attorneys who represent minors, serving the client in this type of case means securing a waiver of parental consent rather than objecting to what might amount to impermissible hurdles placed in the minor's path. As one attorney explained: "Whether I believe that this little girl should say she's prayed about it and thinks it's a sin, whatever hoops she has to come through, she can jump through and get her waiver, and as long as that happens, I'm happy."<sup>360</sup> When asked whether objections to these hoops get raised at hearings, this attorney added: "Do I object? No, because the waiver would be denied. . . . And if I would have to take it up on appeal, I don't know what the Court of Civil Appeals would do."<sup>361</sup> Emphasizing the reality of pursuing the waiver process in the "Bible Belt" and before conservative judges, this attorney defended her approach:

This is the system that I work under. And the system is what those judges believe: as long as they follow the law, the ethereal constitutional right of being unduly burdened doesn't matter. . . . And if it were my choice, she would do a two-step and get her waiver. . . . Yes, these judges place more of a boulder in the pathway of abortion. . . . But it is the system and challenging them on the basis of that is not going to help these girls. . . . And if I do that, if I challenge all of these questions on religion and on whatever, I'm not going to be appointed to these cases. And I tell them that you have this choice [to terminate your pregnancy], this is not wrong, this is a constitutional right, and by God you have the right to do with your body what you want to do, but let me tell you how we're going to do this hearing.<sup>362</sup>

Another attorney also highlighted this reality in explaining how impermissible implementation of the waiver process persists:

Who's going to stop it? And judges do what they want to do and when they want to do it. If you care about your next client and paying your bills, you have to get along with the judges. And what are you going to do, ask them to recuse themselves? They won't recuse themselves. And all you've done is ask them to recuse themselves and then you have to deal with them. That can hurt your next client. Look at what we've got here. We just elected Judge Roy Moore, the Ten Commandments Judge [to the State Supreme Court]. He said in a case [when he was a circuit judge] "I am not following the order that Judge Price issued to me." We elected him! Nobody did anything about it.<sup>363</sup>

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<sup>360</sup> Telephone Interview with Attorney representing minors in Ala., *supra* note 121. Though "happy" with the outcome, this attorney expressed her frustration and anger at the manner in which judges implement the waiver process, saying "I come home and slam my books around after these hearings." *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

Minors and their attorneys cannot be faulted for adopting a pragmatic approach. It might even be fair to say that the nature of the situation compels this sort of pragmatism. And therein lies the rub about the myth of rights. The myth is sustained by a tendency of the mind toward idealization, as if cases were adjudicated in Plato's Courtroom.<sup>364</sup> But in the world, it is sometimes necessary and often rational for those without resources or power to tough it out. There are worse things in this world than having one's rights violated. This is why judges will, in all likelihood, continue to mandate counseling from Sav-A-Life despite the constitutional infirmities of such a practice. No one is in a position to stop them.

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<sup>364</sup> The idea of adjudicating cases in Plato's Courtroom comes from Wayne Fishman.